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No. 481

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT.

No. 13756.

VIKING THEATRE CORPORATION,

Appellant,

v.

PARAMOUNT FILM DISTRIBUTING CORPORATION, et al.

Appeal From the Judgment of the United States District Court for the Eastern District of Pennsylvania.

JOINT APPENDIX.

Volume V (Pages 1897a to 2354a).

WILLIAMS & STEIN,
1000 Hill Building,
Washington 6, D. C.
EDWARD BENNETT WILLIAMS,
HAROLD UNGAR,

DRINKER BIDDLE & REATH,
1100 Philadelphia Nat'l Bank Bldg.,
Philadelphia 7, Pa.
HENRY W. SAWYER, III,
R. PHILIP STEINBERG,
DAVID W. MAXEY,
Attorneys for Viking Theatre Corporation, Appellant.

PHILLIPS, NIZER, BENJAMIN, KRIM AND BALLON,
Paramount Building,
New York, N. Y.
LOUIS NIZER,
GERALD F. PHILLIPS,
ALBERT F. SMITH,

SCHNADER, HARRISON, SEGAL & LEWIS,
1719 Packard Bldg.,
Philadelphia 2, Pa.
WM. A. SCHNADER,
W. BRADLEY WARD,
ARLIN M. ADAMS,
BANCROFT D. HAVILAND,
SHIRLEY S. BITTERMAN,
Attorneys for Appellees Metro-Goldwyn-Mayer, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., and Paramount Film Distributing Corporation.

WOLF, BLOCK, SCHORR AND SOLIS-COHEN,
12th Floor, Packard Bldg.,
Philadelphia 2, Pa.
LOUIS J. GOFFMAN,
Attorney for Appellee Warner Bros. Pictures Distributing Corporation.
MORRIS WOLF,
FRANKLIN POUL,
Attorneys for Appellees Stanley Warner Management Corporation and Stanley Company of America.

MORGAN, LEWIS & BOCKIUS,
2107 Fidelity-Phila. Trust Bldg.,
Philadelphia 9, Pa.
ARTHUR LITTLETON,
RALPH EARLE II,

ROYALL, KOEGEL & ROGERS,
100 Broadway,
New York 5, New York.
CHARLES F. YOUNG,
Attorneys for Appellees Twentieth Century-Fox Film Corporation and Fox Philadelphia Building, Inc.

BLANK, RUDENKO, KLAUS & ROME,
1660 Suburban Station Bldg.,
Philadelphia 3, Pa.
EDWIN P. ROME,
MORRIS L. WEINBERGER,
Attorneys for Appellee William

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THIRTY-FOURTH DAY

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HOWARD G. MINSKY, resumed.

DIRECT EXAMINATION (Continued)

By Mr. Sawyer:

Q. Mr. Minsky, do you recall the date it was on which you went to see Mr. Goldman with respect to COUNTRY GIRL?

A. I do not recall the date.

Q. Was it the same date as that written bid was dated, January 17? Would it have been the same date as the date Mr. Goldman put on there?

A. Yes, Mr. Sawyer. Whatever was on Mr. Goldman's bid would be that date.

Q. I just wanted to establish that we can agree that it was January 17.

A. If that was the date.

Q. Do you recall the time at which the second round of bids were due for COUNTRY GIRL?

A. I believe they were due at 5:00 o'clock.

Q. On that same day?

A. On that day, yes.

Q. Now, I made reference yesterday briefly, Mr. Minsky, to the Paramount picture UNCONQUERED which played at the Aldine.

A. Yes, sir.

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(5944)

Q. Now, Mr. Minsky, isn't it true that you once stated that on that film UNCONQUERED, the Paramount film, that the Aldine threw off a gross which was about a quarter of the total monies earned by Paramount in the

entire Eastern Pennsylvania and New Jersey area? Do you recall that testimony that you gave?

A. I recall making a statement. I don't know whether that was the complete context, but I do recall making a statement.

Q. Well, would there be any other context?

A. I have no records in front of me. Do you have, Mr. Sawyer, so—

(5945)

Q. Well, you recall making that statement, do you?

A. I do recall, sir.

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CROSS-EXAMINATION

By Mr. Nizer:

Q. Mr. Minsky, will you tell us, please, your duties in Paramount. You have been given an opportunity to state your title, but what do you do with Paramount? During the period, of course. What is your present full title?

A. My present full title is Assistant General Sales Manager for Paramount Film Distributing Corporation.

Q. In charge of what territory?

A. In charge of supervising, distribution and administration of Paramount pictures for the United States and Canada.

Q. During the period in this litigation what were your general duties? Will you state it with a little more specificity than you were asked.

A. Yes, I shall try.

During the period I was the Mideastern Division

(5946)

Manager for Paramount Pictures and my office was in Philadelphia. I lived in this city and I worked out of this city. I supervised approximately 20 per cent of the United

States, the branches of Detroit, Cincinnati, Cleveland, Pittsburgh, Washington and Philadelphia.

Q. You were asked in the last question about the UNCONQUERED. That picture I am advised played in 1947, the '48 season, as seasons are given in motion picture terminology. Is it true of any important picture that the first-run downtown receipts—there is only one theatre that plays it first-run in Philadelphia, isn't that so?

A. Yes, sir.

Q. Now, is it true of any outstanding picture, any important picture, that the receipts derived from a first-run, let's say in Philadelphia or in any other city, constitute 20, 25 per cent of the total revenue from the territory?

A. Yes, Mr. Phillips—I am sorry; Mr. Nizer. As a matter of fact, the picture UNCONQUERED, which starred Gary Cooper, was a Cecil B. deMille attraction. It was the outstanding picture of its time, of that year, and it is customary for a picture of that importance, of that stature, to gross a very high percentage of what the total territory would gross as the gross obtained for that particular picture.

Q. Also in 1947-1948, would you rate that year in relation

(5947)

to general motion picture business. Was that an outstanding peak year for the entire industry?

A. Yes. That was shortly after the war. Television had not made its full impact on the market. We like to refer to it happily as the golden years of our business. The grosses were extremely high and theatres were grossing new records all the time.

Q. Therefore, would you consider an experience in 1947 or '48 in the old Aldine Theatre as a practical guide when you were making decisions with respect to pictures in 1954, '55 and '56 with respect to the Viking Theatre?

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(5949)

A. No, Mr. Nizer. I would not use a gross of 15 years ago to influence a decision that I would make today.

Q. Very well. Now, you recall, coming to COUNTRY GIRL, sir, that you were asked whether at the time you received Goldman's written bid of $75,000 guarantee you knew that the Trans-Lux had made a guarantee offer of $75,000 in addition to different terms. Do you recall that series of questions?

A. Yes, sir.

Q. The Trans-Lux, of course, is not associated with any of the defendants. That is operated by the Brant Company, is that right?

(5950)

A. Yes, sir.

Q. I show you the Trans-Lux bid that was originally made in this matter and ask you whether, as Mr. Sawyer said, this was a $75,000 guarantee by the Trans-Lux originally or whether it was a different sum.

Mr. Sawyer: As the witness said, you mean, not as Mr. Sawyer said.

A. This was not a bid for $75,000.

By Mr. Nizer:

Q. By the Trans-Lux.

A. By the Trans-Lux.

Q. How much was it?

A. This was a bid for $60,000.

Q. It is so brief, will you just read it. It is only one sentence, isn't it?

A. "My bid COUNTRY GIRL, indefinite run, $60,000 guarantee, terms 90 per cent over $3000 each week. Distributor to"—

Q. You don't have to read the rest. I just wanted to limit myself to guarantees for the moment.

A. Yes.

Q. Now, sir, at that time, on the first opportunity to bid for COUNTRY GIRL did the Goldman Midtown make an oral suggestion of guarantee?

(5951)

A. Yes, sir.

Q. How much was what?

A. $75,000.

Q. So that in the first instance they had offered $75,000, that is Goldman had, and Trans-Lux only $60,000 so far as guarantees are concerned, correct?

A. Yes, sir.

Q. What happened to the Goldman bid at that time?

A. We rejected the oral offer.

Q. Because it was not in writing?

A. The oral bid, yes, sir.

Q. What happened to all the other bids that had been submitted for COUNTRY GIRL at that time?

A. They were all rejected.

Q. Because of inadequacy of terms?

A. For one reason or another, yes.

• • •

(5953)

Q. We have reached the point, so that it will be clear, where all of the first bids were rejected for the reasons you have given, is that clear, on COUNTRY GIRL?

A. Yes, sir.

Q. All rejected by Paramount. Now, then, there is a second—it is put up for bidding again, is that correct?

A. Yes, sir.

Q. Now, then, Mr. Sawyer asked whether at the time you received the written bid of Mr. Goldman's company for $75,000 guarantee and other terms, whether you knew at that time that the Trans-Lux had made a written guarantee of $75,000. Do you recall that series of questions?

(5954)

A. I do, sir.

Q. Now, in the first place, the original bid you have told us was $60,000, of Trans-Lux. It was they who came up to seventy-five on the second bid, is that right?

A. Yes, sir.

Q. Now, I want to ask you this. I show you this telegram from the Trans-Lux Theatre and ask you whether the bid of the Trans-Lux which lifted its guarantee from $60,000 to $75,000 was submitted in Philadelphia here?

A. No, sir, it was not submitted to Philadelphia.

* * *

(5957)

Q. Will you please—you have the telegram in front of you, and I asked—my last question was: Did the Trans-Lux submit its bid lifting its guarantee from sixty to $75,000 to the New York office—to the Philadelphia office?

A. They did not send a bid to the Philadelphia office.

Q. Will you read that telegram?

A. This telegram states—and it is addressed to Ulrik Smith, the Paramount Film Distributing Corporation branch manager:

"Have sent my bid on COUNTRY GIRL for the Trans-Lux Theatre by hand to your home office, Trans-Lux Theatre, Philadelphia."

Q. So that at the time you were in Mr. Goldman's—with Mr. Goldman receiving his $75,000 written guarantee, did you know at that time whether the Trans-Lux had increased its guarantee from sixty to $75,000?

A. No, sir. I did not.

Q. Mr. Sawyer asked you whether you thought it was extra-ordinary—

(5958)

Mr. Rome: Amazing.

Mr. Nizer: What is that?

By Mr. Nizer:

Q. "Amazing" was the word, ~~that the~~ Goldman guarantee of $75,000 and the Trans-Lux guarantee as it turned out of $75,000 was precise to the word, to the dollar. Had Mr. Goldman originally in the first bid submitted—what guarantee? How much?

A. $75,000.

Q. And you have told us that it was the Trans-Lux which changed its guarantee upwards; is that right?

A. Yes, sir.

Q. Now, originally there were how many bids for COUNTRY GIRL of other theaters?

A. If I may see the documentation—

Q. Yes. I will show it to you.

A. —I can answer it accurately, sir.

Q. I think you have them in front of you. Aren't they attached to that telegram?

A. No, sir. They are not.

Q. May I see your sheet, sir, that I gave you? Do you know what the guarantee was in the first bid of the Arcadia?

A. I believe — I believe the guarantee of the Arcadia

Theatre was $60,000 the first time.

Q. And the Trans-Lux you have just told us.

A. $60,000.

Q. And the Viking?

A. $60,000.

Q. Now, so that none of these theaters that you have mentioned are associated with any of the defendants, right. Trans-Lux, which is the Brandt organization; Viking, which is, of course the plaintiff; and the Arcadia, which is Shapiro; right?

A. Yes, sir.

Q. And they all had $60,000 the first time. Did you consider that amazing?

A. No, sir.

Q. I am going to read, in view of Mr. Sawyer's objection, I am going to read first that he asked you—

Mr. Sawyer: 5879.

Mr. Nizer: Thank you. 5881 and 5880.

By Mr. Nizer:

Q. I am going to read Mr. Sawyer's question to you:

"Q. Well, the Viking bid was different with respect to guarantee, wasn't it?"

Your answer:

"A. I would like to look at the documents and then I think I can answer your question correctly, Mr. Sawyer.

"Q. Very well. This is your transmittal, we don't seem

(5960)

to find the Viking bid," said Mr. Sawyer, and he gave you—

Mr. Nizer: May I have the document you showed him? I have a photostat.

Mr. Sawyer: You are talking about the Viking bid now or the Arcadia?

Mr. Nizer: No, no, the transmittal that you gave him.

Will you give me the sheet that you showed him. It was one sheet. That is right, exactly.

By Mr. Nizer:

Q. And he showed you this piece of paper and asked you questions about it. Now, I ask you, is that the entire transmittal. Is that one sheet?

A. This is two sheets.

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(5961)

Q. Mr. Minsky, look at the first sheet of the transmittal letter, and it says, "Continued on the second sheet," doesn't it?

A. Yes, sir.

Q. And when you said yesterday in your testimony, "There is no date provided for availability"—that is, that the Viking's offer did not submit a date—

A. Yes, sir.

Q. —I ask you now to look at the first sheet which I have just shown you and ask you whether the Viking bid did submit a date on COUNTRY GIRL.

A. Yes, sir. They did submit a date.

(5962)

Q. What does it say?

A. Starting date on or about February 22, '55.

Mr. Nizer: May I have the original Viking bid on this?

By Mr. Nizer:

Q. Now, I show you the original document of the Viking bid on the second occasion when he made a second bid and ask you what the date is that he offers for COUNTRY GIRL.

A. On or about February 22, 1955.

Q. I show you the first one that he offers. What date does he offer for COUNTRY GIRL?

A. On or about February 22, 1955.

Q. Now, yesterday you testified that Paramount had sent a request to everyone in the territory that for reasons given February 9th to 15th would be the required date on account of this Academy Award matter. Do you recall that subject matter in your testimony?

A. Yes, sir. I do.

Q. Did the Viking at any time suggest that it would play between the 9th and the 15th or cover the February 12th Academy Award Nomination telecast?

A. Not to the best of my recollection.

Q. Did the Midtown, Goldman's Midtown Theatre, play this picture during the week of the Academy Award Nomination telecast

(5963)

between the 9th and the 15th?

A. Yes, sir.

Q. And how many weeks thereafter?

A. I believe thirteen or fourteen weeks thereafter.

Q. In other words, what was the total amount of playing time of COUNTRY GIRL at the Midtown?

A. I believe it played some fifteen weeks, sir.

Q. What was the amount of minimum time given by the Viking in its bid?

A. They offered a minimum of ten weeks.

Q. Now, you were asked about the fact that the Midtown not only played the 9th to the 15th but opened the picture February 1st.

A. Yes, sir.

Q. Do you recall Mr. Sawyer asked you that? Was that opening date, which ran past the thirteen or fourteen weeks, the telecast of the national Academy Awards, an advantage or disadvantage to Paramount?

A. Well, that was a decided advantage, sir, because—

Q. Why, sir? Why?

A. Because the first week in launching a new picture, the first week is always a big week, particularly on an important picture, and when we have the advantage of having the second week enhanced with the Academy Award Nominations, that gave

(5964)

us an added advantage in the second week, and then the picture went on from there, and I believe, if my memory is correct, within the first three or four—I believe it was the first four weeks—we received a film rental because of that added advantage of somewhere in the neighborhood of around $60,000.

Q. Sixty, $69,000 in three weeks, if I supply that figure from Mr. Rome from his records, will you accept it?

A. I will accept it, sir.

Q. Now, you looked at the four different bids for COUNTRY GIRL of Arcadia, Viking, Trans-Lux, and the Midtown, Goldman's Midtown. Where did the Viking bid rank among all the four bids.

A. In my opinion, the Viking bid was the poorest of all the bids.

Q. In terms of guarantee, first, it was $60,000 as against $75,000, wasn't it—

A. Yes, sir.

Q. —on that picture? In terms of playing time and other matters you have given us your opinion. I won't take you through it to save time.

Now, that, in addition to the availability factor which you have just given us, they didn't give you the date, did they?

A. They did not give us the date that we—as a matter of

(5965)

fact, I recall we made it very important that this be a primary consideration in the awarding of the picture.

Q. Mr. Sawyer asked you about the written bid which Mr. Goldman made on that picture for $75,000 guarantee and other terms. What did you do with that document when you received it?

A. I handed that document to Ulrik Smith, our branch manager in Philadelphia.

Q. He was with you in the room?

A. Yes, sir.

Q. And that was done with that bid and in relationship to all the other bids that came in? There were three others, weren't there?

A. Well, that bid and all other bids on COUNTRY GIRL from all the theaters that bid on the picture were

put in a brown Manila envelope and mailed to our home office.

Q. So that that physical document which you got from Goldman, together with the physical document of bids from the Trans-Lux and the Viking, were all together processed in the same way and forwarded to the bidding department; is that right?

A. Yes, sir.

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(5966)

Q. Mr. Minsky, what is the process of determining a bid in your company?

A. Each interested theater submits in writing a bid. Each one of the bids are forwarded to our home office in New York City. We have a bidding department in our home office. Their function is to open these envelopes and to analyze each bid, reduce it to writing, and draw a comparison as to what each bid is capable of developing in potential dollars. The best bid in the consideration of the bidding department is then taken together with all bids on a transmittal sheet which shows all the figures and shown to the executives who make a final decision in the awarding of the picture.

Q. To your knowledge, is the consideration given to bids in this case as well as any other that you know of based upon a bona fide honest exercise of judgment of the executives?

A. Yes, sir. On this one point our integrity in my opinion is unimpeachable.

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(5970)

Q. When you make these decisions and recommendations to a special department you have told us about, are these made only for Philadelphia or for cities all over the United States?

A. These are made for cities all over the United States, Mr.—

Q. What is the main objective of your company in deciding which theater any place is going to get the theater as against another theater—is going to get the picture against another theater?

A. Our desire, Mr. Nizer, is to try to achieve through sales of our pictures, our attractions, the greatest possible income for our company. After all, pictures today and pictures during this period are produced and were produced at tremendous costs.

It is not inconceivable today and at that time for pictures to cost into the fifteen, $18 million classes,

(5971)

TEN COMMANDMENTS, or three or four or $5 million as we had in the case of COUNTRY GIRL, TOKO-RI, and other pictures; and we don't make rules or try to set up a bidding department exclusively for the Viking Theatre or for the Midtown Theatre or for the Trans-Lux Theatre, or any theater in Philadelphia. This is done to handle theaters all over the United States. and it is in that context that we try to—to analyze bids as they are submitted.

Q. And to the best of your ability and knowledge are these matters done on an exercise of business judgment or with any eye towards Mr. Sley or Mr. Goldman or Mr. Stanley Warner or anyone else?

A. Our decisions are based purely on the best interests of Paramount Pictures.

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(5972)

Q. Mr. Minsky, turning to the picture the COURT JESTER, who was in that picture, please?

A. Danny Kaye.

Q. Now, you were asked about that picture, the COURT JESTER, a number of questions by Mr. Sawyer.

First, let me ask you: Did you receive a number of bids on COURT JESTER from first-run Philadelphia competitors?

A. I believe there were four bids on the picture, sir.

Q. Were these bids and their description sent with a transmittal letter at the same time, in accordance with your procedure, to New York, to what you call the Bidding Department?

A. Yes, sir.

Q. You mentioned the name Dunne, it is A. J. Dunne. Will you please tell us who he is?

A. That is Arthur Dunne. Arthur Dunne is the head of our Bidding Department at the home office in New York.

Q. You also mentioned the name, I think you called him Ted O'Shea—that is Edward O'Shea—who is he?

A. E. K. O'Shea, now deceased. Ted O'Shea at that time was the Assistant General Sales Manager of the Paramount Company.

(5973)

Q. All right. Now, after the Bidding Department—withdrawn.

Did the Bidding Department process these bids for COURT JESTER with Danny Kaye in the same way as all other bids?

A. Yes, sir.

Q. And after they did, did a notification go out to the Philadelphia branch as to any other branch where these bids were being processed?

A. This would be the normal procedure.

Q. I show you this telegram and ask you whether this is the notification that was sent at that time, signed A. J. Dunne? (Document handed to the witness.)

A. Yes, sir.

Q. Will you read it out loud. It is so brief.

A. "Reject and renegotiate COURT JESTER first-run Philadelphia. Offers do not provide proper opportunity to earn film rental commensurate with potential this bid production. Signed A. J. Dunne."

This is addressed to Ulrik Smith, Paramount Film Branch Manager, Philadelphia.

Q. Now, holding that for a moment, your first words were, in that telegram, what? "Reject"—

A. "Reject and renegotiate."

(5974)

Q. Was there a standard practice where a bid had been rejected with respect to negotiations that would follow let's say in Philadelphia?

A. Yes, sir. May I explain?

Q. I would like you to without my leading you.

A. The procedure in Philadelphia in bidding, when a picture was rejected, such as this was rejected by Arthur Dunne in our home office, we would advise every exhibitor in Philadelphia, first-run theatre, that their bids were being rejected, and we would renegotiate with them, and we sent them a letter so advising them, an official letter signed by our Branch Manager in Philadelphia.

We would then contact them and they would either send in a letter or we would renegotiate with them—renegotiate, meaning that we would sit down with each exhibitor and give them the opportunity to exercise their negotiating skill in giving us what they considered to be the best offer that they can give us to earn the greatest possible film rental so that they could get the picture.

This was normal operating procedure.

Then these renegotiated offers would come back and would be submitted to the home office in New York for either acceptance or rejection. This was the procedure.

Q. When you said, "we," you meant Paramount, of course?

(5975)

A. Paramount, yes, sir.

Q. Did that practice vary in any way during the entire period of this lawsuit because of the Goldman-Stanley Warner split?

A. No, sir, it did not. As a matter of fact, Paramount pictures were offered to bid to all theatres, and when bids were rejected or not acceptable we renegotiated again with all theatres, irrespective regardless of the split.

Q. Did you go exclusively to Goldman?

A. No, sir, we did not.

Q. Or to Stanley Warner?

A. No, sir.

Q. Or to anyone else?

A. No, sir.

Q. Now, you said you wrote letters in such a case at the same time that these instructions were given. In the case of COURT JESTER, was a letter sent to the Viking giving it the notification, as you have said, of the rejection of the bid and an invitation to negotiate for the picture?

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(5976)

The Witness: Yes, sir, such a letter was sent.

By Mr. Nizer:

Q. I show you Defendants' Exhibit 31 and ask you if that is the letter sent to the Viking Theatre in the case of the COURT JESTER?

A. Yes, sir.

Q. Well, now, that is brief. Will you please read it carefully. Read it out loud.

A. "Gentlemen:—"

Q. Give us the date, too.

A. It is a little blurred here sir. It looks like December 28.

Q. What year?

A. 1955.

Q. All right, go ahead.

A. "Gentlemen:

"This is to advise you that we received on the motion picture the COURT JESTER, as offered in our letter of December 1, 1955, offers from the following: Arcadia Philadelphia, Viking Philadelphia, Stanley or Mastbaum

Philadelphia. We do not regard any offers as satisfactory. Therefore, we will negotiate further

(5977)

with each of you.

"Kind regards,

"Very truly yours,

"Ulrik F. Smith, Branch Manager."

Q. Was that letter sent to each of the prior bidders?

A. Yes, sir.

Mr. Nizer: Mr. Sawyer has conceded, I believe, or the witness has that the Viking received that letter. Is that all right, Mr. Sawyer?

(Mr. Sawyer nods head in affirmation.)

Mr. Nizer: Yes, sir. All right.

By Mr. Nizer:

Q. Was there at any time during this entire period of litigation any variation from this practice that you have just described?

A. Not to my knowledge, sir.

Q. In every instance where a bid was rejected or bids were rejected was everyone given an equal opportunity to negotiate?

A. Yes, sir.

Q. Including the Viking?

A. Including the Viking.

Q. Now, you were asked a long series of questions about adjustment that was given on the COURT JESTER, this same picture, after the Midtown got the negotiated picture. Now,

(5978)

without leading you, I am going to give you these documents and ask you to tell the Court and jury what they are

and I will just ask you one question. In your own way would you please describe what happened with respect to what is called an adjustment here. Will you please tell us. You can refer to these documents and we will offer them in evidence.

(Documents handed to the witness.)

A. When we looked at the COURT JESTER the first time, which was—

Q. That is with Danny Kaye, is it not?

Mr. Sawyer: Is there a question pending?

Mr. Nizer: Yes. I asked him to explain in his own way, so that I will not lead him or ask him the question, what happened with respect to the adjustment that you asked him about. I am going to let him tell us.

By Mr. Nizer:

Q. Tell us the facts.

A. When we looked at the COURT JESTER for the first time, which is a big, important motion picture starring Danny Kaye, Glynis Johns, Basil Rathbone and Angela Lansbury, a picture that cost us well over three million dollars to produce, we felt that we had a picture equal in importance and size and stature to WHITE CHRISTMAS.

(5979)

This letter was sent to our branch managers all over the United States. Ulrik Smith in Philadelphia received such a letter.

Q. Give us the date.

A. The letter is dated December 2, 1955. And this letter goes on to explain that we would like to sell this film to the theatres throughout the land for a film rental, and it so states, no less than 50 per cent of the gross. And we asked for that opportunity. And this letter—which is cus-

tomary—we do this on all pictures, advising our branch managers of the sales policies, and we hope that the picture will develop in size and stature and drawing appeal at the boxoffice commensurate with our opinion. This doesn't always happen. Such was the case of the COURT JESTER.

We thought we had a big picture. Apparently the people that buy tickets at the theatres didn't think so because they didn't come in sufficient numbers to give us the kind of gross we expected.

And so, very quickly getting a feeling of the picture and its grossing potential around the country, another letter went out to the branch managers. That is this letter, and we call this a "Speedgram Special" because it advises the managers quickly. It is dated December 5. And it told the branch manager, in the case of Philadelphia, please

(5980)

disregard the sales policy terms set forth in the communication which was dated December 2nd.

"The following definite policy will apply," and without taking up your time, it reduces the terms on the picture. And it reduced it down to a chance where we have the opportunity to earn 50 per cent but we would reduce the basic terms to 40 per cent with an opportunity to go up.

Q. May I interrupt, please, for just one question there. Was that policy national or was it addressed to Philadelphia?

A. This was addressed to every branch manager throughout the United States. This policy was not directed at the Viking or the Midtown or any exclusive theatre in Philadelphia; this was all over the United States.

Then very quickly we found out that the picture was not performing and we reduced it further with the opportunity to reduce the picture, if the gross was poor enough, to 35 per cent. So we came down from 50 to 40 to 35 per cent.

Now, we had sold the picture in Philadelphia on competitive negotiations at top terms, above the 50 per cent.

Q. To whom?

A. If my memory is correct, we made a deal in the Midtown Theatre to earn as high as 65 per cent of the gross, and I believe it was for a four-week minimum playing time, and all

(5981)

four weeks had the opportunity to go up to 65 per cent.

Well, after we had made this deal—

Q. Excuse me for interrupting you. I show you the contract, so that you will be sure, with the Goldman's Midtown Theatre and ask you what the percentage was.

A. The first week it was a minimum of 50 per cent to as high as 65 per cent.

Q. That confirms what you just said?

A. Yes, sir.

Q. I just showed you the contract.

A. Yes.

Q. Go ahead.

A. And the second, third and fourth weeks and succeeding weeks, if it held over, would go from 25 to an earning opportunity of 65 er cent.'

Well, after we had made this deal the film buyer came to us and said, "Look here. You came to us in the early stages—"

Q. Pardon me, sir. You say the film buyer. Who?

A. Mr. George Beattie.

Q. Of the Goldman?

A. Of the Goldman Theatres.

"And am I going to be taken advantage of or put in a position that because I bought the picture

(5982)

early—I heard that the pictur around the country had been reduced. Was this so?"

We said, "Yes, it was so, the picture, the policy had been changed. The minimum terms had been reduced. You are quite accurate."

And he said, "Well, the picture didn't perform, it did not develop as we all thought. Other people are buying it for less. I think I am entitled to have it for less."

I didn't agree with him. I felt that we had made a deal and we should stick by this deal, although I recognized the validity of his complaint. And I recognize also that I can't be completely one-sided in my thinking but, nevertheless, I did not want to give in and grant any adjustment on this film. And there was further discussion and it was the feeling, and sometimes within our own company there can be a conflict of opinion—certainly no two film companies ever operate the same way, so that there certainly can be a conflict among film companies in thinking, just as there can be within a company. And after discussion, the picture was subsequently adjusted by our home office to the Midtown Theatre, but adjusted only to the extent whereby the picture in its first week paid off at 42 per cent—42½, I believe —which was the figure that it hit on sliding scale.

(5983)

So that the first week was still above the floor that we asked in our sales letter which I read to you.

The fact is that this was the only portion of the engagement that was adjusted, to the best of my memory.

Q. So that the only adjustment that you had here was for the first week and that went down to 42 per cent instead of the 40 or 35 per cent you had changed national policy to?

A. Yes, sir.

Q. And this is the story of the adjustment with the Midtown?

A. Yes, sir.

Q. Was this adjustment made in order in any way to prejudice or discriminate against the Viking Theatre?

Mr. Sawyer: Objected to.

The Court: Overruled.

The Witness: No, sir.

Mr. Nizer: We will just mark these letters. I don't think we have to take the time to read them, Your Honor.

Is it all right?

Mr. Sawyer: I haven't seen them.

(Documents are handed to Mr. Sawyer.)

Mr. Nizer: All right, no objection. I will not stop to read them, Your Honor. It will take too long.

(Document dated December 2, 1955, captioned
(5984)

the COURT JESTER (Paramount) was marked Exhibit D-83 for identification.)

(Document captioned Speedgram Special dated December 5, 1955 (Paramount), was marked Exhibit D-84 for identification.)

(Document dated January 26, 1956, was addressed to All Branch Managers and bearing the name of Sid-G. Deneau (Paramount), was marked Exhibit D-85 for identification.)

(Document dated February 27, 1956, captioned Intercommunication (Paramount) was marked Exhibit D-86 for identification.)

(Document bearing stamp date of February 3, 1956, captioned Paramount Film Distributing Corporation (Paramount), was marked Exhibit D-87 for identification.)

By Mr. Nizer:

Q. Mr. Minsky, one other question on that subject matter. Do I understand clearly that this was a situation where the Midtown, the Goldman's Midtown, got the picture after the bids were rejected and there was a negotia-

tion? It wasn't the bid that was adjusted, it was the negotiation; is that clear?

A. Yes, sir.

Q. And this was the case where the letter was put in

(5985)

evidence, Exhibit 31, inviting the Viking to negotiate; is that right?

A. Yes, sir.

Q. I show you the Viking bid on COURT JESTER and without taking too much time see if you can tell us how the bid of the Viking compared with the other bids that were put in, including the Goldman's Midtown—that is, by bid I mean the offer of negotiation or bid, either way, the first one that was rejected or the subsequent one.

Mr. Sawyer: Your Honor, I object to this because the witness has just testified that he didn't make these decisions, they were made by the Bidding Department in New York, by a man named Dunne. It seems to me the witness has disqualified himself from doing this evaluation.

By Mr. Nizer:

Q. Did you make recommendations in these matters?

A. Yes, sir.

Q. And did you consult with Mr. Dunne in the regular course of business constantly?

A. Yes, sir.

Q. Does the Sales Department at all times coordinate with the Bidding Department in giving any information or giving its opinion from its knowledge in the field?

A. Yes. This is standard procedure.

(5986)

Q. Will you answer the question.

The Court: Overruled.

The Witness: Well, on a picture that prior to its exhibition that we had expected so much of and had been selling and creating the atmosphere of its size and stature, to receive a bid back from the Viking Theatre offering two weeks with the possible hold-over to be mutually agreed upon, we immediately looked upon this as a bid that minimized the stature and the possibility of earning any money on this type of an offer. Moreover, when you offer on two weeks for only two weeks' playing time, it is inconsistent with sound bidding procedure on the part of the theatre operator to bid on a 90/10 deal for two weeks, meaning that the theatre gets their expenses out first and then we participate to the extent of 90 per cent over that figure.

Moreover, as part of this bid it was stipulated that all advertising, and then they went on and listed—now, there was something most peculiar in my opinion when I saw this. It stated that all advertising, including teaser and first-week newspaper ads, and each item was listed, bill-boards, daters, even painting costs, and rental of five painted billboards, each one was individually listed that we were to pay for.

In addition, they went beyond that. They said

(5987)

should it play subsequent weeks, all newspaper advertising and engravings we were to pay for, and so forth.

• • •

(5988)

Q. Did the other bids that were processed, for example, Stanley or the others, did they require a hundred per cent of advertising to be paid by Paramount and list all these items, or was this, as Mr. Sawyer used the word, unusual, unique? Was this kind of an advertising clause customary?

A. No, this was most unusual.

Q. That is for Viking.

A. Particularly in the manner in which it was worded.

Q. Now, you have had an experience with a similar kind of bid where the Viking did get the picture prior to this, had you not?

A. I don't know particularly.

Q. LUCY GALLANT. Does that strike a bell?

A. It is a loud bell.

Q. All right. Will you please again—I will not lead you—tell us what happened with LUCY GALLANT. Is that a Paramount picture?

A. LUCY GALLANT is a Paramount picture.

Q. With Jane Wyman and Charlton Heston?

(5989)

A. Yes, sir.

Q. All right. Now tell us what happened in that situation.

A. Well, we offered the pictures first run Philadelphia and we received one bid, to the best of my recollection, and that bid came from the Viking Theatre. The bid was rejected and we advised them it was rejected and I believe we renegotiated with them and that, too, was rejected. Then subsequently I believe Mr. Jay Wren made a deal either in person or on the telephone, I am not certain which, but he made the deal with Mr. E. K. O'Shea, the gentleman that I mentioned before, and that particular deal that he made with Mr. O'Shea was on a 90/10 basis for a limited number of weeks. And I believe it was—

Q. Three weeks, if I can supply it to you.

A. Three weeks. And Paramount to pay all advertising. We paid all the advertising and the picture played. It did very poorly in the Viking Theatre, so poorly in the Viking Theatre that while the Viking Theatre made a profit Paramount suffered a cash out-of-pocket loss of $3000 and I had occasion to speak to Mr. Wren and told him he had made money and we had lost and I would like to rediscuss this deal. And I was asked, "Are you kidding?"

LUCY GALLANT was a disaster in my opinion both in concept of deal and the ultimate play-off and the net dollar result.

(5990)

Q. This was the prior experience you had before considering this deal on COURT JESTER, the Viking offer?

A. Yes, sir.

Q. Is this deal that the Viking offered about the same as the one they offered on LUCY GALLANT?

A. I believe in that—yes, in that area.

Q. When you said you wanted to rediscuss the deal, what did you mean by that? Did you specify—

A. I would have liked, Mr. Nizer, to have worked out a deal with the Viking where I lost money this time, I would like to sit down and talk with them and see if they wanted to talk with me about reimbursing me.

Q. And his words were?

A. "Are you kidding?"

Q. Did they ever do anything about that?

A. No, sir.

Q. Now, in the case of the COURT JESTER, I show you this and ask you whether Stanley Warner also put in a bid.

A. Yes, sir, they put in a bid.

Q. Nevertheless the Goldman Theatre obtained the picture on that negotiation, right?

A. Yes, sir.

Q. Did the Stanley Warner bid provide for 100 per cent advertising to be paid by the distributor, by Paramount?

(5991)

A. No, sir.

Q. Did the Arcadia put in a bid on the COURT JESTER?

A. Yes, sir, they did put in a bid.

Q. Did that provide for the distributor, Paramount, to pay 100 per cent of the advertising?

A. No, sir.

Q. Did any of these bids have any of these terms about all these billboards and painting and signs that were specified that Paramount would pay for as in LUCY GALLANT?

A. No, sir.

Q. Incidentally, on LUCY GALLANT did you have the same kind of an advertising clause?

A. I don't know, Mr. Nizer. I would want to look at the record.

Q. I won't stop, sir.

A. I would assume so.

Q. I won't stop.

Was the Stanley bid better on the COURT JESTER than the Viking bid on COURT JESTER?

A. Yes.

Q. Nevertheless Stanley didn't get the picture either?

A. Yes, sir.

Q. Now, sir, did you ever discuss the subject to a split of Paramount pictures with anybody at the Viking Theatre?

(5992)

A. Yes, sir.

Q. With whom?

A. Mr. Wren.

Q. Mr. Jay Wren?

A. Yes, sir.

Q. Will you tell us about when that was.

A. I would put it about September—yes, it was right after Labor Day—about September of '55.

Q. Now again so that I don't ask you any questions, will you tell us what happened in your own way.

A. Yes, sir. This very unusual situation was developing in Philadelphia and I knew that something was going

on here. Just what it was I did not know. And I am referring to the manner of doing business and conversations that were taking place with the Viking Theatre by Mr. Smith and myself when I was in town.

So I went to my home office and spoke with those executives under whom I worked and I said to them that I would like to have the privilege of doing something unusual and coming back to Philadelphia and offering to all the first-run theaters in Philadelphia an opportunity to share in Paramount pictures on both a quantity and a quality basis, and I was given such approval.

Q. Excuse me. When you say share do you mean—

(5993)

A. I mean to split.

Q. In the same way that Goldman-Stanley Warner had a split?

A. Yes, sir.

Q. To split it for all the theaters?

A. For every theater in Philadelphia, every first-run theater in downtown Philadelphia.

Q. Did you communicate with all of the first-run theaters about that?

A. Yes, I did.

Q. Now, particularly with respect to the Viking, who did you talk to and what was said?

A. I called Mr. Jay Wren on the telephone. I told him of my thinking. I told him of the suggestion and he said to me, "Would you put that in writing?" And I said if we had such an agreement of course I would put it in writing. And he said, "I will get back to you within a week."

And he did. He called me back in a week, within a week, sometime within seven days, and he told me he was not interested. I asked him why and there was no further discussion. He was quite curt and just simply stated that they were not interested in such an arrangement, and that was the end of that.

Q. All right. You aiso talked to the Arcadia at that time?

A. Yes, sir.

Q. And to Stanley Warner about spreading the split?

(5994)

A. Yes, sir.

Q. And to Goldman?

A. Yes, sir.

Q. And all the others?

A. Yes, sir.

Q. I won't ask you about conversations with the others because perhaps there would be an objection.

But that never was adopted by the Viking Theatre?

A. No, sir.

Q. Who had the final authority in awarding Paramount pictures during this period?

A. During this period Ted O'Shea was the man responsible for awarding the Paramount pictures.

Q. That is the gentleman who has died since?

A. Yes, sir.

Q. Now, sir, at any time during the entire period of this litigation did Paramount in dealing with the Viking or any other theater in Philadelphia consult with or talk to any other distributor representative concerning any deal that would be made with the Viking, the Stanley, the Goldman or anyone else?

A. Of course not, Mr. Nizer.

Q. Did you when you negotiated or bid or decided these matters deal and did Paramount deal alone for its pictures

(5995)

with each theater that it was dealing with?

A. Yes, sir.

Q. At any time during this period of the lawsuit did you or anyone to your knowledge on behalf of Paramount

consult with the Goldman defendant or the Stanley Warner defendant with respect to any terms or privileges of any kind that would be extended or not extended to the Viking Theatre?

A. No, sir.

Q. At any time did either Stanley Warner or Goldman or anyone else outside of the Viking request you to withhold from the Viking Theatre any privilege, request or terms of any kind that you weren't ready to consider on the merits dealing with the Viking?

A. No, sir.

Q. Is that true with respect to availability, adjustments, advertising clauses or anything else?

A. Yes, sir.

Q. Can you state solemnly under oath that whatever was done in these transactions with the Viking Theatre was done in the best exercise of honest judgment of the Paramount Company without any influence or stimulation of any kind direct or indirect from anyone else, either distributor or exhibitor?

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(5996)

A. I certainly do swear under oath to that.

Mr. Nizer: That is all, sir.

Mr. Rome: I have one question.

By Mr. Rome:

Q. Mr. Minsky, there was a question put to you by Mr. Sawyer to the effect that you have said in the past that the film UNCONQUERED, a Paramount film which played the Aldine Theatre, accounted for approximately 25 per cent of the total film rental earned by Paramount out of the Philadelphia exchange territory. Do you remember that, sir?

A. Yes, sir.

Q. Now, COUNTRY GIRL at the Goldman Theatre earned a film rental for Paramount of $151,000, isn't that the fact?

A. Yes, sir.

Q. And the total film rental earned by Paramount in the Philadelphia exchange territory on COUNTRY GIRL was $401,000, isn't that the fact?

A. Yes, sir.

(5997)

Q. Which would mean, would it not, Mr. Minsky, that the Midtown Theatre accounted for some 38 per cent of the total film rental earned by Paramount from the showing of COUNTRY GIRL in the entire Philadelphia exchange territory?

A. Yes, sir.

Mr. Rome: Thank you.

By Mr. Wolf:

Q. I have a few questions to ask you, Mr. Minsky.

I believe that you have before you the offer of Stanley Warner for COURT JESTER, do you not?

A. Yes, sir.

Q. It is dated when?

A. December 13, 1955.

Q. Signed by whom?

A. Signed by Ted Minsky.

Q. Is that your brother?

A. Yes, sir, it is my brother.

Q. That is the picture that you gave to the Goldman over the bid of the Stanley Warner?

A. Yes, sir.

Q. Now I call your attention to a bid that was made by Stanley Warner for THE BIRDS AND BEES, dated March 22, 1956. I ask you by whom that was signed.

A. Signed by Ted Minsky.

(5998)

Q. Was that bid received by Paramount?

A. Yes, sir.

Q. Did Stanley Warner get the picture?

A. No, sir.

Q. Who did?

A. I believe it played the Midtown Theatre.

Q. I show you a bid dated March 30, 1956, from Stanley Warner to Paramount for the picture THE PROUD AND THE PROFANE and ask whether that bid was received by Paramount.

A. Yes, sir.

Q. There was no question raised with respect to the award of this bid to Stanley Warner in the pretrial memorandum but I would ask you to note from the offer of Stanley Warner whether there was any guarantee there.

* * *

A. Yes, sir, there is a cash guarantee in here.

(5999)

By Mr. Wolf:

Q. Oh what? What amount?

A. $55,000.

Q. I now show you an offer dated April 12, 1956, from Stanley Warner to Paramount for the picture WAR AND PEACE and ask whether that offer was received by Paramount?

A. Yes, sir. This is a—

Q. To whom?

A. This is a letter from Stanley Warner to Paramount regarding WAR AND PEACE addressed to Ulrik Smith.

Q. And was the picture awarded to Stanley Warner—

A. Yes, sir. The picture—

Q. —according to that bid?

A. The picture played the Stanley Theatre, as I recall.

Q. But it was awarded to Stanley Warner?

A. Yes, sir, according to this bid.

Q. I call your attention to the fact that that bid provides for a house allowance on a 90/10 basis; is that correct?

A. Yes, sir.

Q. And how do you account for the fact that you made the award to the Mastbaum Theatre for that picture—

Mr. Nizer: The Stanley.

By Mr. Wolf:

Q. —the Stanley Theatre for that picture when you told us

(6000)

that that was not your ordinary policy with respect to the comparisons of bids?

A. I don't quite follow the question, Mr. Wolf.

Q. The offer states the terms of the bid, does it not?

A. Yes, sir.

Q. And what are the terms of the bid?

A. 90 per cent of the net boxoffice receipts over $7,483 per week.

Q. That is right. Now, you have told us before that bids which provided for the payment of a percentage to Paramount after the house expense had been realized were not favored by Paramount.

A. No, sir. If I made that statement, I—I made it in a different context.

The point that I was making was that a 90/10 deal on an important attraction is an excellent deal to develop the greatest possible boxoffice dollar accruable to Paramount, but when you have a 90/10 deal on a picture that has a limitation as to its running time and as to its potential in the theatre, it is not a good deal. It was in that context that I made the comment.

Q. I understand. Well, now, with respect to WAR AND PEACE, what kind of picture was that and what

was the nature of the bid as to playing time which led Paramount to award that picture

(6001)

to Stanley Warner.

A. WAR AND PEACE in its release was a most unusual picture. It was a picture that was produced abroad at a tremendous expense. Many, many millions of dollars went into this picture—

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(6002)

Q. Now, are there any other pictures that were awarded to Stanley Warner that were not awarded on written bids which it made and which you have produced here?

A. Not to my knowledge, sir.

Q. I ask you one more question: In your dealings with

(6003)

Stanley Warner, was any attempt ever made to influence you or anybody else in Paramount, as far as you know, as respects your dealings with Viking in connection with pictures which they had indicated any interest in buying?

A. No, sir.

• • •

RE-DIRECT EXAMINATION

By Mr. Sawyer:

Q. Now, Mr. Minsky, with respect to again to the picture COUNTRY GIRL, you have testified that it was decided that it was an advantage to Paramount that Mr. Goldman opened this movie not when he stated he would on the 9th of February but rather on the 1st, did you not?

Mr. Nizer: I object to that. He didn't state he would open it on the 9th. He stated in his bid that he would meet the terms of the availability and had actually opened on the 1st.

Mr. Sawyer: Well, now, let us see what he stated.

(6004)

By Mr. Sawyer:

Q. I have here P-23. Doesn't he say here, Mr. Minsky —you recall this, don't you?

A. Yes, sir.

Q. "Midtown Theatre, indefinite run, starting on or about February 9?"

Mr. Nizer: "On or about."

The Witness: Yes, sir. It so states.

Mr. Sawyer: All right.

By Mr. Sawyer:

Q. Now, you state that—was it considered to be an advantage to Paramount that the fact that he opened it on February 1st.

A. As it turned out; yes, sir.

Q. Because you thought that that gave you two big weeks instead of one, in effect?

A. No, sir. I didn't state that. I said that opening it the week before gave us an added advantage, because we had the big first week, the second week—

Q. Go ahead.

A. I wanted to wait until you were through.

Q. No; no. Go ahead. Continue.

A. The second week gave us an opportunity to play it during the Academy Award nomination period and we took off

(6005)

from there and rolled.

Q. Well, why didn't you have it—why didn't you when you wrote to the distributors on January 12—

Mr. Sawyer: Strike that.

By Mr. Sawyer:

Q. —the exhibitors, why didn't you then say that you wanted it to open February 1st, if that was an advantage?

A. Mr. Sawyer, it is not at all uncommon in dealing with theatres on a bidding basis to have awarded a picture and then subsequently after the picture has been determined where it will play to move out a picture a week earlier if it is to our advantage. It is—

Q. All right.

A. It is to our advantage to get the greatest possible dollar out of the picture.

Q. Right. Now, would you answer for me why it was when you wrote the letter specifically saying that it was essential that the motion picture open between the 9th and the 15th and it was essential because of the Academy Awards, if it was an advantage to open it on February 1st, why didn't you inform the exhibitors then that that was when it was to be opened and that was when their bids should specify?

A. Because our target was to open the picture so that it would encompass the Academy Award nomination night--

(6006)

this award did just that—and in addition to which we were able to increase the playing time on the forepart of the engagement.

Q. The situation wasn't any different after January 12, was it, Mr. Minsky?

A. I am sorry, Mr. Sawyer. I don't know what you mean.

Q. All right; that letter of January 12 represents the best business judgment of Paramount as to when that picture should open in view of the Academy Awards coming on, does it?

A. This letter of January 12 represents the opinion of Paramount to get that picture dated to encompass that period.

Q. It doesn't say "encompass it." Well, what period does it say, is it to encompass there?

A. Well, the fact is—

Q. What are the dates given there?

A. The dates given here state that it is essential that the picture open between February 9 and 15.

Q. All right. Very well.

A. However, the fact is, Mr. Sawyer, that theatres around the country have different opening days. One theatre may open on a Wednesday. Another theatre may open on a Thursday. Another theatre may open on a Friday. You cannot have all theatres open all the time. This letter was not directed to

(6007)

the Viking Theatre. This was sent all over the United States to every theatre—

Q. All right—

A. —where we anticiated opening.

Q. All right. Now, Mr. Minsky, it was—that particular letter wasn't sent all over the United States, but, accepting that, it was sent to a number of exhibitors here, wasn't it?

A. When I state "that particular letter," Mr. Sawyer, I am speaking only in reference to the point you are making, sir, about the opening date, the time.

Q. That is right; and this letter—this letter actually specifies, does it not, that it isn't a question of—

Mr. Sawyer: Well, strike that.

By Mr. Sawyer:

Q. It isn't a question of whether or not the motion picture opened on a Thursday or a Friday instead of a Saturday; it actually opened nine days ahead of that earliest date in that letter which Paramount said it is essential the picture must open; do you agree with that?

A. I not only agree with what happened. I agree that it was a distinct advantage to our company.

Q. Well, if it was an advantage to your company, why wasn't it an advantage on January 12 to your company?

(6008)

A. Because when making the offer we had to have everybody have the same starting time. We had to have everybody be advised of the same fact.

Q And why didn't you—

A. Once the deal—

Q. That is all right.

The Court: Just a minute.

By Mr. Sawyer:

Q. You have answered that.

The Court: Just a minute. Let him go ahead.

By Mr. Sawyer:

Q. Why didn't you advise everybody on February 1st?

The Court: Just a minute, Mr. Sawyer. Let him finish.

The Witness: Once the deal was concluded based on the equity and the fact that the best offer received the picture, it was certainly within our operational decision, if we were offered an additional week on the forepart of the engagement, to accept it.

Mr. Sawyer, this is common in our industry. This is done all the time, if you can pick up, and it is an advantage to the theatre and to the distributor and will get the most dollars for both, and no one is hurt by it. There is no disadvantage in so doing.

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(6009)

Q. I still put to you, Mr. Minsky, the question, that if it was an advantage to Paramount to have a week earlier than

(6010)

the week of the Academy Awards, why that wasn't apparent to Paramount when they wrote the letter on January 12 specifying that the earliest date on which this motion picture was to open was the 9th of February?

A. Because in our judgment in order to get the picture properly launched, we felt that nationally that target date was the best target date for all theatres concerned around the United States.

Subsequently, when the picture was awarded, it was the decision and the business judgment to pick up an additional week, if it was agreeable with the exhibitor that won the picture and acceptable to us.

Q. And you are—

A. In both instances, it worked out that way.

Q. You are stating then that the judgment of Paramount on this motion picture in which they invested these millions, on which there had been this tremendous build-up and thought given, that its judgment in this respect changed from February 12—

• • •

Q. —until—and on January 17 or thereafter when it was awarded; is that your testimony?

• • •

(6011)

The Witness: No, sir. That is not my testimony, Mr. Sawyer. If—I apologize to you, sir, if I am not being lucid enough to make the point and explain it. I—I will—I will try to repeat it, if I may.

When we set this picture, the target date, and advised all the theatres in Philadelphia that this was

the way we wanted to go, we did it because we wanted the picture to, hopefully, have the opening week encompass the Academy Award nominations.

Now, once the picture had been awarded and the exhibitor came to us and said, "Now, look, here, the way the playing time is opened up I can open your picture a week earlier and the second week we will have the Academy Award nomination contained therein. Will you accept it?"

We thought about it and we accepted it, because in our business judgment this was the best way to earn dollars for Paramount, and that is why we accepted the booking.

By Mr. Sawyer:

Q. All right; then at Mr. Goldman's suggestion you changed the policy that is mentioned in that letter between January 12.

(6012)

sometime between January 12 and February 1 when he actually opened it nine days ahead of his contract, Paramount's business judgment with respect to opening date changed; is that correct?

A. No. That is not correct.

Q. Well, it must have changed, did it not?

A. It did not change.

Q. Well, did you agree with him opening it on February 1st?

A. I did not speak—

Q. No, not you, personally; did Paramount agree that Mr. Goldman—that he should open it on February 1st?

A. Mr. Sawyer, it seems as though we have an honest difference of opinion here. I just can't seem to—

Q. No—would you answer that question?

A. I just can't seem to agree with what you want me to agree to.

Q. Can you agree—

A. We did not change our policy.

Q. Well, then, you didn't—then on February 1st when he opened it your policy remained that it should open and it was essential it should open between the 9th and the 15th?

A. Mr. Sawyer, this has nothing to do with the policy. The picture had been awarded clearly on bid to the best bidder and we decided on our best business judgment to open

(6013)

this picture the way we did.

Q. All right.

A. As it developed,—

Q. At Mr. Goldman's suggestion.

A. —it was most prophetic for us, because the gross proved that we were right.

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(6014)

Q. With respect to the earliest date on which this picture should open, did that letter of February 12 express the policy?

A. This letter stated that, "We are attaching hereto a request for offer and it is essential that the picture open between February 9th and 15th and that all information required on our request form should be filled in. The last date on which we will accept offers is January 17, '55."

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(6015)

Q. Now, the policy as stated there is that the earliest date on which this picture should open is February 9; is that correct?

A. No, sir. That is not correct.

Q. Isn't that what it says, that letter?

A. No, sir. It did not state that.

Q. Does it not say that it is essential that the picture

(6016)

open between the 9th and the 15th?

A. Yes, sir. It says that.

Q. What is the earliest date between the 9th and the 15th?

Mr. Rome: Let the witness finish his answer, Mr. Sawyer.

Mr. Ward: I don't think, sir, that Mr. Sawyer ought to argue with the witness as to what the letter says. There is the letter, if Your Honor pleases. I object to this.

Mr. Sawyer: Well, Your Honor, when the witness says something that just—he says that doesn't state a policy—

By Mr. Sawyer:

Q. I will ask you to read once again, if you will, what it says in that letter with respect to the earliest date on which the picture is to open, and just that portion, if you will.

A. I will try to, Mr. Sawyer.

"Therefore,"—and I will try to restrict it to that—"it is essential that the picture open between February 9 and the 15th."

Q. All right. Now, what is the earliest date between the 9th and the 15th?

A. Well, I would say the 9th, Mr. Sawyer.

Q. Very well. So is it true, then, Mr. Minsky, that the

(6017)

earliest date according to that letter on which Paramount says it is essential this motion picture shall open is the 9th of February? Is that true?

A. It is true; however, Mr. Sawyer—

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(6019)

Q. Now, in actual fact, Mr. Minsky, the picture did open on February 1st, did it not?

A. Yes, sir.

Q. And that was by agreement with Paramount; is that correct?

(6020)

A. It was by permission of Paramount.

Q. By permission. Very well. Therefore, Mr. Minsky, is it not true that sometime between January 2nd and February 1st Paramount's policy with respect to the various dates on which it was essential that the picture opened changed?

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The Witness: No. Paramount's policy did not change. The fact is that we accepted a booking where the picture opened a week before because it was for the best interest of Paramount to so accept that booking. The policy of our picture opening, the date and everything else contained remained the same. We wanted to encompass that Academy Award nomination.

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(6022)

Q. The question, Mr. Minsky, is whether or not with respect to first-run Philadelphia the policy of Paramount as to the earliest date on which this motion picture should open changed between February 12 and the date on which it did open?

Mr. Ward: Objected to.

The Court: This is the last time I am going to permit you to ask that question.

Overruled. Go ahead. Answer it again.

The Witness: No, Mr. Sawyer. It did not change.

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(6024)

Q. Mr. Minsky, you are familiar in terms of playing time in a bid with the difference between a definite run as a term, and an indefinite run, termination at the discretion of the distributor?

A. Yes, sir.

Q. For instance, here in COURT JESTER, which we have had, both of us, just a moment ago, the play time offered there is indefinite run, minimum four weeks, and then does it go on and say—what does it say then just right after that with respect to playing time?

A. Are you referring to the Midtown Theatre?

Q. Yes.

A. "The picture is not to be withdrawn without distributor's approval."

Q. And that qualifies this general statement indefinite run, does it not?

A. I don't know exactly what you mean by "qualifies."

Q. Let me put it this way: If it just said indefinite run

(6025)

and it didn't have that additional clause, or words to that effect, the distributor then does not have the option solely to himself as to when the picture is to be terminated, isn't that right?

A. I am sorry. I don't quite follow you.

Q. Well, doesn't it say there, it starts out, indefinite run, is that right?

A. A minimum of four weeks.

Q. And then does that bid go on and state that the picture is not to be withdrawn without the consent of the distributor, or words to that effect?

A. "Without distributor's approval."

Q. "Distributor's approval," and that additional phrase there is necessary in the bid, is it not, to give the

distributor the sole option as to whether the picture is to come off or to stay on?

A. Beyond the four weeks.

Q. Yes, beyond the four weeks, right.

Now, without that, you would have, as far as the indefinite run part of it goes—forgetting the four weeks for a moment, without that additional statement that the distributor is to have discretion in the matter, the distributor then wouldn't automatically have the right to say how long the picture is going to play beyond the four

(6026)

weeks, is that right?

A. No, I wouldn't say that, Mr. Sawyer.

I think it is generally the right of the distributor to request how long a picture shall play, based on good business judgment.

Q. But, as a matter of contract, if it just says indefinite run, he doesn't have that right, unless it goes on and says that he is to have it; isn't that correct?

A. No, sir, it doesn't say just indefinite run, it says indefinite run with a minimum of four weeks.

Q. I agree with that. I do not mean to imply at all that this would not mean that he has to play it four weeks. I am just talking generally now about this and I just give that to you as an example of the tenor of this. Agreeing with you that he has to play it four weeks under that, but if it just says, forgetting that four weeks, or in addition to that four weeks—if it just says indefinite run, and you don't have that additional statement in there, which this bid has, then the distributor wouldn't actually have the right beyond the four weeks to say how long the picture is to play or when it is to come off, unless he put that in there; isn't that right?

A. Well, Mr. Sawyer, I hate to start an answer. You stopped me once before. But it is academically known that

(6027)

when you accept an offer on an indefinite run in our business generally the term indefinite run means that the picture will play and the termination date will be subject to the approval of the distributor.

Q. Then why do you go on in many bids—you are familiar with the practice, are you not, of saying indefinite run, termination at the discretion of the distributor; you are familiar with that, aren't you?

A. Yes, yes, Mr. Sawyer.

Q. And in other bids, bids that are submitted, you just say plain indefinite run.

A. Yes, sir.

Q. Now, doesn't it require the additional clause in there in order to confer upon the distributor the discretion as to when the picture is to come off or how long it is to continue?

A. Sometimes discretion is applied, Mr. Sawyer, contingent on the track record of the people with whom you are doing business.

When you are doing business with people where there is a give and take and a rapport that has been established, you do not question such a statement, or such an inference, or a definite word, such as "indefinite." On

(6028)

the other hand, there are times when you would question this, and it doesn't have a meaningful tone to you.

So that you couldn't categorically say that because one thing says something that that is the way it is going to be. It depends with whom you are doing business.

Q. Well, granted that these things all depend upon with whom you are doing business, my question is why in some bids in your experience, why do some of them say indefinite run, and why do others have the qualifying phrase "termination at the discretion"—indefinite run,

termination at the sole discretion of the distributor? Doesn't it take that second phrase to—

A. I really can't answer that, Mr. Sawyer.

I noticed that at times in looking at bids and I honestly cannot answer that question, because I do not know what is in the mind of the buyer that uses that kind of language. One time it is one way and another time it is another way—

Q. Well, what do you—

A. —and I quite agree with you that there are times when you look at bids and you do question it in your own mind, but then you say, well, that is the technique, or this is the ability of the man in the way he is bidding.

Q. And from the standpoint of evaluating these bids, isn't

(6029)

it important to know what is meant by these two phrases?

A. Well, Mr. Sawyer, I again say that I think it is important to know with whom you are doing business, just as a manufacturer might deal with a retailer. He knows with whom he is doing business and he knows how they perform, and based on that knowledge, plus what he sees in front of him, and the language, he puts it all together. I don't think any one thing makes a decision.

Q. No, I am not saying that any one thing makes a decision. What I am asking you is whether it has any significance to Paramount in the evaluation of a bid as to whether or not the bid says indefinite run, or whether it says indefinite run, termination solely at the discretion of Paramount; does it make any difference to you at all?

A. I think there are times when—I am not trying to straddle the fence, and I want to answer your question. I do think that, of course, it makes a difference, but I don't know at the moment as to how you would apply it on any one picture. It depends on your over-all negotiations and dealings and relationships.

Q. Well, it is clear, isn't it, that the difference that it makes, to the extent that it makes a difference—and I am not asking you to say precisely to the extent it makes a difference, but it is clear, is it not, that to the extent it

(6030)

makes a difference the distributor is in a far better position with respect to how long the picture plays where the bid doesn't say just indefinite run, but it says indefinite run, discretion solely is to the distributor.

A. In my own mind, Mr. Sawyer, it makes no difference to me.

Q. Oh, it would make no difference to you?

A. In my own mind it would make no difference to me, because there would be many, many things that would go into my decision as to awarding the picture.

Q. When you said you thought it was a factor do you mean it might be a factor in the judgment of others at Paramount, but not in your personal judgment?

A. No, I wouldn't go that far. I don't know what it would be in the minds of other people. I think, as I said before, that there are many components in finally coming to a conclusion.

Q. I understand that, but the only reason I defined it is because it will take time to go through it, but I want you to understand that I am now asking you about one component only, namely, playing time, and I had understood, Mr. Minsky, a moment ago, that you had said that there was a difference between the two, and I used just plain indefinite run or indefinite run at the discretion of the distributor. Now, am I correct, didn't you say that there was a difference?

(6031)

A. Mr. Sawyer, at this point, I don't recall what I said because you have asked me on this point so many different questions. Whatever I said is in the record, and if you are quoting me I am sure you are quoting me accurately.

Q. What is your statement now, is it a factor at all? You say as to you personally it would not be a factor.

A. No, because I think there are many, many things that go into a final decision.

Q. But just taking the factor of playing time alone as one of the many things that go into a decision on a bid, taking that element solely, would you as a distributor, as the person in charge of sales, prefer a bid that said indefinite run, or one that said indefinite run, termination solely at the discretion of Paramount?

A. Well, taking that one point solely—

Q. That is right.

A. —which I believe is your question—

Q. That is right.

A. —you cannot possibly in my opinion award a picture based on that one point solely.

Q. I understand that. Now let us agree to that.

A. There must be other elements that go into it.

Q. Right. Assuming a case, and I am not saying this is one, where all other elements are equal.

(6032)

A. Yes, sir.

Q. Would you as an employee, as a sales person in Paramount, all other elements being equal, prefer a bid which said indefinite run, termination solely in the discretion of Paramount, or one that merely said indefinite run?

A. In my own opinion, in looking at that type of bid, if it said indefinite run, I would assume it would be at the discretion of Paramount.

Q. You would assume then. All right. We will come back to it. You would assume then that a bid saying indefinite run and a bid saying indefinite run solely at the option of the distributor are really exactly the same?

A. There are times it could be exactly the same. And there are other times, depending upon with whom you are doing business, that you would look upon it with a jaundiced eye.

Q. But the person that you are doing business with, aside from that, the terms themselves as they exist in a licensing contract, or as they exist in a bid, you would say were actually the same, because indefinite run—

A. I could not—

Q. —gives Paramount that discretion anyway in your opinion.

A. I am sorry, Mr. Sawyer. What were you saying, sir?

(6033)

Q. You are saying they are the same in your view because indefinite run means at the discretion of the distributor anyway.

A. Yes. But again, coming back to this one point, there are so many—for example, someone might say, an indefinite run, and then make an offer of two weeks—

Q. Oh, now—

A. —or someone might say, an indefinite run, and then mitigate the indefinite run with some other circumstance as part of the bid.

Q. I understand that.

A. So you must—

Q. I am only interrupting you because I want to save time.

I thought we had agreed that I am now speaking about one element of a bid alone. We have fully agreed that there may be guarantees to be considered, there may be a number of other elements. I am only speaking now of the element of playing time. Just that element, and we are not speaking about other elements that may go into the decision as to whose bid is actually accepted. My last question was specific, but I want to get clear your position on this: Do I understand it to be that with respect to that element of a bid, standing by itself, the term in the bid which says indefinite run is really the equivalent of a bid which says

(6034)

indefinite run, termination at the discretion of the distributor, because in your view the former actually means that Paramount would have that discretion anyway.

A. Mr. Sawyer, I have learned through unhappy experience in this industry that you cannot give a categorical, over-all answer that would cover every situation.

I again state that in my opinion you might take each individual offer and analyze it based on its own components.

Q. Mr. Minsky—

A. If you would like me to give an answer that would be an over-all yes or no, well, I am sorry, I can't comply, because I just can't look upon it in that way.

As to indefinite run, I would look upon indefinite run as a clause that would be based as to its length of run, based on the distributor's termination of the run.

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(6035)

Q. Now, with respect to the motion picture the COURT JESTER you testified just now, did you not, under examination by Mr. Nizer, with respect to a number of elements that you felt were superior in the terms that you negotiated for the COURT JESTER with the Goldman Theatre as compared with the Viking bid, and you recall that testimony you gave just a moment ago with Mr. Nizer.

A. Yes, sir.

Q. First of all, with respect to COURT JESTER, do you remember Mr. Nizer had showed you this letter, which you read, that certain bids for COURT JESTER were being rejected?

A. Yes, sir.

Q. And the motion picture exhibitor to whom this picture was awarded on negotiation is not listed there as having been a bidder, is he?

A. The motion picture exhibitor?

(6036)

Q. Yes, the exhibitor to whom this picture was ultimately awarded on negotiation—

A. Oh, no, sir.

Q. —is not listed there.

A. No, sir.

Q. And he didn't bid then on this picture at this point, is that right?

A. At this point, no, sir.

Q. Does the last paragraph of that letter state that Paramount will take a certain action?

A. Yes, sir, it states that we will negotiate further with each of you.

Q. Did Paramount in fact ever take that action?

A. Yes, sir.

Q. It negotiated with the Viking?

A. Yes, sir.

Q. You negotiated with the Viking after this rejection?

A. I personally?

Q. No, Paramount.

A. Ulrik Smith, our manager in Philadelphia, contacted the Viking Theatre, and offered to negotiate with the Viking Theatre just as he did with any other theatre.

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(6037)

Q. Now, do you recall what the Viking bid was on COURT JESTER? It was just mentioned I think. Can we agree that it was 90/10 over $5000 house expense?

A. Well, with the question you are asking me, I think I would like to look at the documentation.

Q. I think you just mentioned that before, but I will give

(6037a)

it to you.

This is P-18. Don't you remember you looked at it and you pointed out there was advertising?

A. Yes, I recall that.

(6038)

Q. Is that correct?

A. Yes, sir.

Q. 90/10 over $5000?

A. Yes, sir.

Q. 90/10 over $5000.

Mr. Nizer: Now what about the advertising clause?

Mr. Sawyer: All right, just a minute.

By Mr. Sawyer:

Q. There is no bid from the William Goldman Theatres but there is an actual contract of license, is that correct? And that is it that I have just shown you, right?

A. Yes, sir.

Q. That provides terms of a sliding scale, a sliding percentage scale, does it not?

A. The first week has a floor of 50 per cent.

Q. That's right.

A. To 65 per cent. And then a sliding scale from 25 to 65 per cent, yes, sir.

Q. So that you had a sliding scale depending on the gross. First of all, on your first week you would have a minimum of 40 and the second week—the first week a minimum of 50 and the second week a minimum of 40, is that right?

A. No, sir.

Q. I am sorry. I didn't mean to—you state it again. will

(6039)

you.

A. The first week 50 per cent to 65 per cent sliding scale.

Q. Very well.

A. And the second, third, and fourth and succeeding weeks 25 to 65 per cent on a scale.

Q. Right. Now, this was the motion picture that you testified that after the initial terms which were sent by Paramount to its personnel as to what they should ask for, those terms were lowered because the picture was then thought not to be as big as Paramount had earlier thought. Do you recall that?

A. Yes, sir, I do.

Q. And that Speedgram that said that you might reduce those terms, which was shown to you, this Speedgram said that you could give the exhibitor assurance that the terms could be reduced as low as 40 per cent?

A. Yes, sir.

Q. That is dated what? What is the date of that?

A. This is dated December 5.

Q. What is the date of this contract?

A. January 20.

Q. Is it 20th or 27th? It doesn't make any difference for this purpose but--

A. Well, I will put my glasses on and maybe I can see it more clearly.

(6040)

Q. I thought it was the 27th.

A. This is dated January 20.

Q. 20th, very well.

In any event, some six or seven weeks later that contract was entered into, is that correct?

A. Yes, sir.

Q. All right. Actually the fact that Paramount's second guess, so to speak, on COURT JESTER in the terms

required had nothing to do with the reduction after this contract was signed of the terms for the William Goldman Theatres, did it?

A. You have me a little confused, Mr. Sawyer.

Q. Well, let me put it to you this way: If it was—I will change it around completely and put it a totally different way.

Didn't you testify that it was the decision on the part of Paramount to permit exhibitors to exhibit this picture at a minimum of 40 per cent rather than a minimum of 50 per cent that prompted Paramount to permit the Goldman Theatres to enjoy that right and therefore that was why the contract dated January 20 was revised downward to 40 per cent terms?

A. No, Mr. Sawyer. That is not so at all. You are putting a connotation on this that just isn't true.

Q. Well, if it isn't so that is all right, but it is not my

(6041)

connotation. Did you not—

A. The fact is—

Q. Did you not so testify?

A. I believe I so testified.

Q. Very well. Did you not testify with reference to the Speedgram of December 5?

A. Yes, I did testify to the Speedgram.

Q. Did you not say that upon receiving that Speedgram you were advised of a new Paramount policy with respect to the COURT JESTER which permitted minimum terms of less than 50 per cent?

A. This was one of three changes in the policy, the general sales policy on the picture.

Q. Well, were there changes—I don't want to confuse you—were there any changes subsequent to January 20?

A. If I saw the letters I could tell you, Mr. Sawyer.

Mr. Nizer: One is January 26 and one is the 27th, Mr. Sawyer.

By Mr. Sawyer:

Q. Now here is the one dated January 26. What is the lowest minimum that you permitted in there?

A. Thirty-five per cent.

Q. Is it 35 per cent?

A. Yes, sir. Would you like me to read it?

(6042)

Q. I see it. It says 35 per cent.

What is the date of that?

A. January 26.

Q. Now, isn't it true that although this was transmitted on the 20th, that the contract became a contract upon the signature of Mr. Dunne on the 27th of January? That is dated the 27th, is it not?

A. It looks like it. Yes, sir, that is the 27th.

Q. All right. And therefore isn't it true that the contract was entered into with these terms, the sliding scale from 50 to 65 per cent, after this letter of Paramount to its branch managers?

I just want to look at "branch managers" to make sure.

A. Did you see it?

Q. Yes. Branch managers.

A. Yes, that is what it says.

Mr. Nizer: There is one of January 27, Mr. Sawyer, too.

Mr. Sawyer: I don't think we have that here.

The Witness: I am getting these a little bit out of order. I recall this one.

By Mr. Sawyer:

Q. Here is an intercommunication dated January 27, but that

(6043)

doesn't have anything to do with first run, does it? Isn't that only—you look at it and I will ask you the question.

A. Let me read this, if I may.

Q. Yes.

A. This is primarily subsequent run.

Q. That is what I thought. And flat-rental situations, is that right?

A. Yes, sir.

Q. So that the latest communication then in respect to first run is January 26, this one, I take it, right?

A. There is another one I thought that I had seen which had to do with this picture.

Q. Well, that is December 2. That is even earlier.

A. Yes.

Q. Now we have December 2, the Speedgram of December 5 and the interoffice memo to all branch managers of January 26, is that correct?

A. Yes, sir.

Q. And the date that this contract was accepted and became a contract at your office in New York was after this letter to all the branch managers, is that correct, the 27th?

A. It is so dated.

Q. All right. So that at the time you then had binding contract with the William Goldman Theatres for a percentage

(6044)

between 50 and 65 per cent on the first week, is that correct?

A. Yes, sir.

Q. And that was what was subsequently reduced to a lower percentage.

What was it reduced to? I ask you because I don't recall. Was it to 40?

A. It was reduced to sliding scale.

Q. To sliding scale?

A. Yes, sir.

Q. And in fact earned for that first week—

A. I believe it was 42 per cent.

Q. Forty-two per cent.

Now, coming back then to what you have there in terms of that license agreement, and comparing that with the Viking bid, would you agree with me that with respect to the—strike that.

Do you know what the COURT JESTER actually grossed at the Midtown Theatre? Do you recall that?

A. No, sir, I do not have the figure here and I do not recall the exact gross.

Q. I would not suppose that you would. We have had that figure and subject to check by your counsel can we agree that in four weeks at the Midtown it grossed $46,456?

A. Subject to that check.

(6045)

Q. Will you accept that?

A. Yes, sir.

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(6053)

Q. Now, while this is being worked on, on this picture COURT JESTER, you heard of course right here a great deal about the

(6054)

difference in the two weeks' and the four weeks' playing time, correct?

A. Surely.

Q. On the Viking bid what is the offer with respect to playing time?

A. Minimum of two weeks with a possible holdover to be mutually agreed upon.

Q. So that the two weeks' minimum has a provision there, does it not, that the distributor and the exhibitor can

mutually agree on a longer run; a holdover means that, does it not?

A. No, sir, it does not mean that.

Q. It does not?

A. No, sir. When a bid is submitted and I analyze a bid I analyze its minimum as its maximum. I must do this in order to protect my company.

Q. Very well.

A. I cannot go on the basis of Blue Sky.

Q. You are telling us that the only thing that that absolutely would legally assure you of is a minimum of two weeks?

A. Yes, sir, Mr. Sawyer.

Q. I agree with that. Now, does it go on and say—does the Viking in its bid go on to suggest that if mutually agreed upon the picture could hold over?

(6055)

Mr. Ward: I object, sir, to what the bid suggests.

Mr. Nizer: That is true in any case.

Mr. Ward: The language is before the witness. It is not what the suggestion was, it is what the offer was.

By Mr. Sawyer:

Q. What does "holdover" mean? That is what I am trying to get.

A. Beyond contract playing time.

Q. All right. And the bid there says with a possible holdover to be mutually agreed upon, does it not?

A. Mr. Sawyer, Mr. Sawyer, in all honesty this is a two-week bid. There is no question about it.

Q. All right. Does it say with a possible holdover to be mutually agreed upon?

A. It is language, it means nothing.

Q. Does it say that?

A. I have seen—yes, it says it, Mr. Sawyer.

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(6060)

Q. Yes. Would an exhibitor, theatre owner, who got a $12,000 gross in the second week, would he, governed only by his own self-interest, desire to make money, would he not wish to hold that movie over?

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A. I would not know, but I would like to say this in that connection: Since the contractual time is only two weeks, and if the distributor decided to pull it because he had another picture backed up, notwithstanding a $12,000 gross, it would be within—well within his right, and I have seen it happen in many parts of the country where this very thing has happened.

(6061)

However, we are going along on a premise that I must call your attention, Mr. Sawyer, is somewhat incorrect, because you are talking here about a film rental that is an inaccurate figure:

When we pick up 100 per cent of the advertising, you must add that over your house expense, and this becomes a very important consideration, and whether or not we would spend the kind of money necessary if we are paying 100 per cent of the tab on this particular engagement would have a great influence on the gross of a picture in a given theatre.

Q. And on the license that you entered into with the Midtown Theatre, there isn't any provision for advertising, is there?

A. There is no stipulation here regarding advertising; however, as my memory serves me, we agreed upon a budget in the theatre and then there was a figure at which we split costs.

Q. Very well; and you paid, actually you paid $5000 back to—reimbursement to the Midtown Theatre for advertising expenses, did you not?

A. We did not pay anybody any money back.

Q. Well, I will read you the answer of your company—

A. Yes, sir.

Q. —to this question. You paid—the question was: You paid $4,901.57 to William Goldman Theatres as your share

(6062)

of the advertising expenditures?

Mr. Nizer: It was a 50/50 deal, Mr. Sawyer.

By Mr. Sawyer:

Q. Is that correct?

A. I don't know, sir. If you state it, then it is—that is what we agreed, then.

Q. You did pay back, then, didn't you? You paid back?

A. We did not pay back. I would like to—

Q. Didn't you say—

A. I would like to explain it, if I may, Mr. Sawyer.

Q. Well, now, just a moment. You may explain it, but I am calling your attention to the fact that under oath in this case in a request for admission Paramount has said you paid back $4,901.57 to William Goldman Theatres, Inc., as your share—

Mr. Nizer: Your Honor—

By Mr. Sawyer:

Q. —of the advertising expenses.

Mr. Nizer: Your Honor, this is purely a semantics quibble, that when they pay 50 per cent of the advertising, if the exhibitor pays it out in advance, they pay it to him, they pay it back in that sense, but what the witness is saying is that they didn't pay back anything; they shared the advertising.

(6063)

The Court: Yes. Well, the witness can say that he differs with that statement and why.

The Witness: May I

The Court: Yes.

The Witness: I differ with that statement, and the reason is because this particular picture was produced by Dena Productions which is an independent company owned by Danny Kaye and associates.

Price Waterhouse, our accountants, insist that the Paramount Company in dealing with independent producers, which we are practically dealing with today completely, must have advertising and film rental in two separate columns.

So that there must be a relationship to advertising and film rental in computing net income, but in computing the amount of money spent, it is separately and apart—the money is spent locally—therefore, my company, Paramount Pictures, reimburses the cost that is laid out, but that cost is shared jointly. It is not something that we pay for 100 per cent and it is not a rebate in the form of a credit or a pay-back to the exhibitor.

By Mr. Sawyer:

Q. Now, I am not suggesting there was anything wrong. I just want to get the figure. Isn't it correct that your share, if you prefer to use that phrase, of advertising on COURT

(6064)

JESTER was $4,901.57, if that is what is stated here? You would agree with that, would you not?

A. I would accept your word if that is what is stated there; yes, sir.

Q. Now, coming back, Mr. Minsky, to the COURT JESTER—or, you have—

A. Yes, sir.

Q. —that typewritten sheet there?

A. It is here, Mr. Sawyer.

Q. Very well. Now, there has been a correction in this figure and it is now agreed that the gross here at the Midtown Theatre for its full four weeks was forty-four, forty-four thousand, 44,695.53—

A. Yes.

Q. —and that on that this other figure remains the same. We agreed that there was no change in that. Paramount received a film rental of $13,834.02. Now, let us put the advertising in right now. We are putting the advertising in. It is also, now, I take it, agreed by you, that your share of the advertising, to avoid the pay-back thing, although it says that in the answers to the requests for admissions, was $4,109—and what are the cents, Mr.—

(6065)

Mr. Steinberg: 57 cents.

By Mr. Sawyer:

Q. —57 cents?

A. Mr. Sawyer, I can't agree to that.

Q. Well, it says so in your answer to the interrogatories.

A. I am sorry, sir. I—you are asking. I can't agree to it, because we have to pick up costs when we deal with the Viking—

Q. I am coming to the Viking.

A. —that we do not have to pick up when we deal with other theatres.

Q. I am coming to it.

A. Well, then, I apologize. I am sorry.

Q. This is just the Midtown.

A. I am sorry.

Q. Just what you did with the Midtown.

A. I am sorry.

Q. Don't worry. I am coming to it.

Now, this is the Midtown right here. This is what happened. This is the film rental. Well, this is the film rental, actually, isn't it, and this is your share at the Midtown for advertising; that is the figure?

A. If you so state.

Q. And, therefore, what you got as a net would be . . .

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(6066)

$10,932.45.

• • •

By Mr. Sawyer:

Q. Now, and believe me, when we do this we are going to put in the fact that the advertising at the Viking Theatre called for you to pay all of it.

A. Yes, sir.

Q. All right. Now, on this gross at the Midtown—

A. Yes, sir.

(6067)

Q. —and we are assuming—we are assuming that because of the desire of the Midtown—of the Viking Theatre, that with a $12,000 second week, they would, in fact, have wished to play it for four weeks. We are assuming that now, that they, therefore, would have played it four weeks, that this gross would have been achieved, that on this gross, assuming that that would happen, would you agree that if you applied 90/10 to this over their house nut of $5000, that you would obtain—and, if not, we will work it out on the board—that you would obtain a film rental initially—initially, now, before advertising—of $22,225.98?

And let me say that that figure is obtained by assuming four weeks of a house nut of $5000. That is 20,000 comes off of that right away; right? So 20,000 comes off?

Mr. Nizer: I don't understand.

By Mr. Sawyer:

Q. That is 24. Are you with me?

Mr. Nizer: I know; but I am—

The Witness: I am with you, Mr. Sawyer, but I would just like to make an observation. May I?

By Mr. Sawyer:

Q. Well, can we agree about the figures?

A. I agree with your hypothesis—

(6068)

Q. All right.

A. —which I don't consider to be realistic.

Q. I understand you don't.

A. Yes, sir.

Q. But, I mean, as far as the mathematics goes, we come out all right here?

A. Yes, sir.

Mr. Nizer: Mr. Sawyer, may I just ask, is that for two weeks or four weeks, these last answers?

Mr. Sawyer: It is all done on the basis of four weeks.

Mr. Nizer. Four weeks.

Mr. Sawyer: My hypothetical question to the witness was—

Mr. Nizer: All right.

Mr. Sawyer: —that we are assuming that since this motion picture achieved a first week of 16,000, a second week of 12,000, in fact; a third week of 10, that the Viking would take advantage of its to be mutually agreed upon clause and continue beyond the minimum of two weeks.

By Mr. Sawyer:

Q. We are assuming that now, Mr. Minsky, and I know that you think you are going to disagree, but we are assuming that they would.

(6069)

A. It is an extremely broad assumption.

Q. And they would get—well, you don't—you don't know of too many cases, do you, where a distributor is compelled to take off a movie that is earning twelve thousand in gross?

Mr. Nizer: He doesn't know that. I object to that, sir. He doesn't know that at the time he is deciding the bids.

Mr. Sawyer: All right.

Mr. Nizer: It is obvious.

By Mr. Sawyer:

Q. But, generally speaking, if, in fact, a movie was earning that amount, would not an exhibitor decide that he would like to play it another week?

A. Mr. Sawyer, I would not make general observations on something so important as dollars to my company. I could not assume this. I am entrusted with an obligation. I am not going to make hypothetical assumptions.

Q. But, in fact, would it be your experience first-run Philadelphia that with a gross of $12,000 that the picture is not generally taken on either by a distributor or exhibitor? That is true, isn't it?

A. My experience in first-run Philadelphia would teach me that this picture would be committed for two weeks in the Midtown Theatre—in the Viking Theatre, and no longer, and

(6070)

I would so base my decision and my hypothesis, on that arrangement.

Q. And can you come back to answer my question, generally, whether it is your experience that first-run Philadelphia, a motion picture earning $12,000 would be played another week?

A. It could be.

• • •

(6074)

Q. And it was a picture that had a substantial but not a tremendous gross. Is that a fair statement? Its first week was 16,000.

A. I don't think it was a substantial gross. It was a disappointment to us.

Q. Disappointment. Very well. Now, its second week was 12,000?

A. Yes, sir.

Q. Its third week was 10,000. Its fourth week was five. Very well. You have those figures? You agree with them?

A. I would—I agree with the figures—

Q. Well, that is true, isn't it?

A. I agree with the figures you gave me.

Q. All right. Just take the figures.

A. However, there was one question I would like to ask, if I may. I would like to see the calendar, because I think at that point there was a holiday involved which kicked the gross up and ordinarily would not have kicked the gross up. I would

(6075)

like to analyze it if you are asking me questions about it.

Q. Well, now, on that point—

A. I—we are both trying to arrive at the truth.

Q. On that point, Mr. Minsky, let us assume that the picture, since the bids both said on availability, would have played the same time, so that doesn't make any difference, does it?

A. It would make a difference, Mr. Sawyer.

Q. It played—would have played the same time at the Viking as it played at the Midtown, would it not?

A. Yes, but it played on two different arrangements, Mr. Sawyer. One was a two-week commitment. One was a four-week commitment.

Q. I understand that, Mr. Minsky. We all have that very clearly in our mind now. I just want to explain to you what I did with these figures.

Now, do we agree that they were the grosses for the picture actually obtained at the Midtown Theatre?

A. The Midtown grosses we agree—

Q. Very well.

A. —on that figure.

Q. And that total gross, without giving it week by week, was $44,695?

(6076)

A. If you so state.

Q. Now, the assumption I made, Mr. Minsky, was that the picture might have been awarded, conceivably, to the Viking by Paramount. I mean, this isn't outside the realm of possibility, is it?

A. Based on this bid it is outside the realm of possibility.

Q. All right; but you wouldn't state that it is outside the realm of possibility for the Viking Theatre to get a Paramount picture, would you?

A. No, sir.

Q. Very well. So it might have, if you had liked this bid, it might have gone to the Viking Theatre; it might have, if you thought this was a good bid; you would have given it to the Viking, wouldn't you?

A. But I didn't think it was a good bid.

Q. If you had, would you have refused to give it to the Viking, Mr. Minsky?

A. If I thought it was a good bid, we would have awarded the picture—

Q. Very well.

A. —to the Viking.

Q. Now, had it gone to the Viking Theatre, the terms that the Viking offered would have applied to whatever gross it achieved there, wouldn't it? Would it not?

(6077)

A. It would, sir.

Q. Very well. Now, I made one simple assumption, Mr. Minsky, and I think you could follow it. I just made one assumption, that this motion picture, playing at the Viking Theatre, would have grossed the same amount as it did at the Midtown, the same motion picture, same time, and that it would have grossed the same amount. Now, you may disagree with this, but this is the assumption I made.

A. No. I don't disagree with you.

Q. All right.

A. It could happen.

Q. It could happen!

A. Yes, sir.

Q. Anyway, I just want to explain to you, this is the assumption that was made, and I want you to understand that we did make that assumption, and we took the same length of time and everything else and we assumed that at the Viking it would have made also 44,695.53.

Now, sir, I then showed you—these are actual figures —I then showed you the film rental that was paid to your company, less the share of advertising, and therefore the net which was—the net Paramount obtained out of the showing first-run Philadelphia.

Now, up to there we are clear, because this is

(6078)

what actually happened at the Midtown; right?

A. Yes, sir.

Q. All right; now, then, on the assumption I just told you about, I applied the Viking's terms, which were 90/10

over $5000, to this gross, and I took $5000 for four weeks and I got $20,000; and actually that has to come off first, does it not, and that leaves 24,695, and then it is easy from there on in, because we take 10 per cent and you take 90; right?

A. No. You have to add on the 20 the cost of the advertising.

Q. All right. We are going into that. First I have to get the two, of course.

A. All right.

Q. That is very simple, because we just take 2,469 off, because that is our 10 per cent, and you get the rest of this figure, don't you, and hence 22,225 before advertising?

A. No.

Q. Are you with me up to there?

A. I am, but let us not do it that way. If we are going to do it right, let us do it the other way.

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(6081)

Q. Now, on the mathematics of this alone, Mr. Minsky, you understand, and you must have done it many times, how these figures are derived.

A. Yes, sir.

Q. And as to the additions and subtractions involved you don't

(6082)

have any disagreement with this, do you?

A. No, sir, I do not.

Q. No, I say to you, as you point out, under our bid all of the advertising would have had to have been paid for by Paramount?

A. Yes, sir.

Q. As opposed to the only $4901.57.

A. Yes, sir.

Q. I am now telling you that this is the figure of total advertising expended by both Paramount and William Goldman, and that therefore I do deduct every penny of it from this amount.

Do we not come out then with $14,959.65 to Paramount as opposed to $10,000? We do come out with that, don't we?

A. Yes, you do.

Q. Very well.

Now, there is one further point: In our bid it says, does it not—first of all, it simply says that advertising is to be paid for by the distributor; hence the $7000 figure, is that correct?

A. (No response.)

Q. When it speaks of advertising costs, and you read this before—

(6083)

A. Yes, sir.

Q. —that advertising costs should include certain particulars with respect to billboards, for instance, painting costs, that it would include rental for fifteen 28-sheet boards, not to exceed $14.92, that specifies what the advertising shall include; that bid doesn't say that any of those figures are in addition to the total advertising campaign and its total, does it; is that correct?

A. No, sir, it is not correct.

Q. Well—

A. In my opinion this is an extraordinary type of statement.

Q. I understand that. You say that because it specifies certain items for which the distributor shall spend the advertising money, it is extraordinary, as you testified to, under Mr. Nizer's questioning, but you don't say, do you, that any of those figures are purported in that bid to be in excess of the total advertising budget?

A. No, sir, but I do say that what is within that budget is extraordinary.

Q. Well, very well.

A. It is unusual, and it is the sort of advertising expense that is developed and created by this operation that is outside the realm of normal advertising expense.

Q. It is?

(6084)

A. Yes, sir.

Q. It isn't normal advertising expenditure to have newspaper ads?

A. No, sir.

Q. You don't have newspaper ads?

A. I said it is not abnormal for newspapers.

Q. Oh, and that is one here, right?

A. Yes.

Q. That is normal, isn't it?

A. Yes.

Q. The necessary engravings are part of the newspaper ads, are they not?

A. Yes, sir.

Q. Is it not normal to have radio and TV announcements?

A. Yes, sir.

Q. And is it not normal to have billboards?

A. It is abnormal to have the kind of billboards that are part of this type campaign.

Q. Well, you do use billboards in advertising motion pictures?

A. Not as a rule.

Q. For instance, you used them on COUNTRY GIRL, didn't you?

A. You asked me a question as to whether it is normal to use them and I stated that it is not as a rule. There are unusual exceptions.

(6085)

Q. When you say "unusual exceptions" you are not saying, are you, that it is an extraordinary thing to use billboards to advertise motion pictures?

A. Well, I have always made the point that in the case of the Viking Theatre there were certain billboards that were controlled by Mr. Sley that we had to pay for, we had to use if we played the Viking Theatre. I may be slightly inaccurate because it is—I am speaking now generally applicable to this, but these billboards that they had we had to use in playing the theater.

• • •

Q. Now, Mr. Minsky, before the recess we were speaking of this clause for advertising in the Viking bid; do you recall that?

A. Yes, sir.

Q. And the one which you had said was unique.

A. I said it was extraordinary.

Q. All right, I thought Mr. Nizer said "unique." Very well.

And we are taking it item by item, if you recall, and you had agreed, had you not, that newspaper ads and engravings were a commonplace in motion picture advertising, and radio and TV announcements, and then we came to billboard,

(6086)

and you agreed that the use of billboards for advertising motion pictures was not unusual.

A. I think I stated that the use of billboards—well, if I didn't state it, what I would like to say is that billboards generally we do not use around the country, generally; there are some unusual specific cases where we do use billboards.

Q. Well, we agreed that just on two of these pictures here today, you used them on COUNTRY GIRL, for in-

stance, and let me ask you also, didn't you use them on TEN COMMANDMENTS?

A. I think we did.

Q. Extensively, did you not?

A. We used them, as to how extensively I cannot tell you.

Q. Very well. Then I believe you said that with respect to these billboards there was special consideration with respect to certain billboards that were located on properties, parking lots owned by Mr. Sley.

A. I didn't say that.

Q. Well, I am sorry. What was your contention in that regard?

A. I said that the costs of these billboards were excessive, that we had to use the billboards that the Viking Theatre either owned or was committed for and we had to pay a stipulated price, and I always opposed this. I felt this was irregular and I felt that we shouldn't have to pay for these costs.

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(6087)

Q. Did you know, Mr. Minsky, that there was no rental charged by the landowner for these billboards?

A. I have no such knowledge.

Q. And did you not have an arrangement with respect to the motion picture LUCY GALLANT that included billboards? You played LUCY GALLANT at the Viking, did you not?

(6088)

A. We certainly did.

Q. And you received from the Viking statements of the expenditures that they had made in connection with advertising?

A. We may have, but the LUCY GALLANT engagement was devastating.

Q. All right, Mr. Minsky. I know that, your counsel has brought it out.

We are confining ourselves now to this—

A. Yes, sir.

Q. —question, if we may, with respect to advertising on LUCY GALLANT.

A. Yes, sir. We had to pay for all the advertising on LUCY GALLANT.

Q. That is right, and in accordance with the customary practice you were furnished, were you not, with statements and invoices as to what advertising expenditures the Viking had actually made?

A. That is exactly the point, Mr. Sawyer. After playing LUCY GALLANT—

Q. I didn't ask you that.

A. After playing LUCY GALLANT I wanted no more of it.

Q. Very well.

A. And this was following LUCY GALLANT.

Q. You have stated that, Mr. Minsky, in response to questions from Mr. Nizer.

(6089)

Now, will you answer, please, my question as to whether or not in connection with the engagement of LUCY GALLANT, in which billboards were utilized, you did not receive from the Viking a statement, with the appropriate vouchers, as all distributors do, of the advertising that they expended for LUCY GALLANT; you received those, did you not?

A. I did not receive it. I assume if you state it, that it was received by somebody at Paramount.

Q. Paramount.

A. I did not receive it nor did I see it.

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(6090)

Q. And your not knowing that, did that hinder you in evaluating bids? Wouldn't that be something that you would have to know?

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The Witness: Let me try to answer your question

(6091)

to the best of my knowledge. I know you are trying to arrive at what the facts are and I want to help you in arriving at them.

The figure I saw on advertising was always the gross figure. I never saw a breakdown as to the vouchers to which you made reference a moment ago. I didn't see this sort of thing.

Mr. Sawyer: I understand. All right. That is a fair answer.

The Witness: I saw the gross figure. Now, after seeing the gross figure I wanted to know the components of that figure and I would ask the advertising man, well, how this came about. Why did we spend this kind of money, when it is so excessive? And then he would tell me that it went into this area, it went into that area, or it went into the other area.

He didn't come up to me and show me vouchers or figures.

And I took that information, and based on that information, as in the case of LUCY GALLANT, for which we got clobbered in advertising, and had a net out-of-pocket loss. I wanted no more of it, and this was my business decision.

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(6102)

Q. So that advertising in both cases came into the bid, right, or it came into the transaction?

A. Not to the degree that it came in in the case of the

(6103)

Viking.

Q. I will agree with you, sir. But as a net result of this Paramount lost money on BIRDS AND BEES, the Paramount picture at the Midtown, and it lost money on LUCY GALLANT at the Viking?

A. Yes, sir.

Q. And it has lost money, has it not, on other motion pictures which have played the defendants' theatres first run in Philadelphia? They aren't the only two cases during this period when the net result to Paramount was a loss, are they?

A. Unfortunately we have had cases where we have lost money.

(6104)

Q. Very well. And have you ever had a case first-run Philadelphia where the exhibitor in such a situation gave Paramount some money to help them make up the loss?

A. No, we haven't had a case where we have actually received money back from an exhibitor first-run Philadelphia to make up a loss.

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RE-CROSS-EXAMINATION

By Mr. Nizer:

Q. Mr. Sawyer asked you whether Paramount lost money on pictures that it plays first run. Are there situations on which Paramount has lost as high as a million or more dollars on a picture?

A. Unfortunately, yes, sir, Mr. Nizer.

Q. Does that affect your judgment when you are trying to get the best bid? Do you think of the fact that you are trying to get back these moneys which sometimes result in millions of dollars of losses, so that you are always trying to exercise your judgment with one goal in mind, where will you get honestly the most money, from what theater?

A. Yes, sir, yes, sir.

(6105)

Q. You were asked about the advertising and questions about it. Does the gross of a theater as it comes in week after week have an affect upon the advertising that is spent week after week?

A. The gross of a sustaining run can affect the degree of moneys that are spent in the theater.

Q. In other words, irrespective of what figure Mr. Sawyer or I would give you, whether that figure is small or large depends upon the gross box office receipts, doesn't it?

A. Naturally.

Q. Now, I will supply you, because we have these figures stipulated to on LUCY GALLANT, which played three weeks at the Viking, the grosses were $19,000—I will leave out the other dollars. The COURT JESTER, which played at the Midtown for four weeks, one more week, is $44,000. Nineteen against forty-four. Now, in relationship to those grosses does the advertising become smaller or larger depending upon the gross, its proportion?

A. Yes, sir.

Q. So that if Mr. Sawyer just makes assumptions and compares advertising expense, that by itself wouldn't give you any fair indication of the situation, would it?

A. It could not.

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(6106)

Q. Now, while those figures are still on the board, just one or two things about their accuracy which Mr. Sawyer asked you to assume.

Look at the Viking bid, please. Do you observe that among the expenses to be taken off, house expenses, is a special figure for overtime?

A. I do not have the Viking bid here, sir.

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(6109)

Q. In any event, if you make those two alone—and I won't stop on the others because I am trying really to shorten this—that would make the figure reverse. That is, there would be more money even on this kind of computation—

(6110)

A. About $3600.

Q. It would make the opposite result. But now I want to get away from that, Mr. Minsky. I want to ask you this. When you make a recommendation to your company on bids that you receive do you compare the bids that you have before you on the basis of the terms in those bids?

A. Yes, sir.

Q. Do you attempt to take the gross of another theater and assume that the Viking will have that gross, or if the Stanley makes a bid assume that it will have the Randolph gross? Do you do any of that kind of juxtaposition of figures in making any kind of computation? Has that ever been done in the history of your experience in this business?

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(6111)

Q. Is that a technique that to your knowledge of—how many years in this business?

A. About 31 years, Mr. Nizer.

Q. Have you ever done that or heard of anybody doing that in deciding what bid is to be awarded?

A. No, sir. It would be totally unrealistic.

Q. When you do look at prior performance, what prior performance do you look at, at what theater?

A. I look at the theaters that are bidding on that particular Paramount picture for that particular period.

Q. In other words, you do go back if you want to see how that theater has done to your own picture that may have played there previously?

A. Yes, sir. We keep a record of our own comparatives.

Q. Now, at the time that you had the bid on the COURT JESTER had you had this experience with LUCY GALLANT that Mr. Sawyer mentioned?

A. Yes, sir.

Mr. Sawyer: This is repetitious, Your Honor, (6112)

it was testified to on original cross, precisely this question.

Mr. Nizer: No. I am going to give a computation. You compel me to go back and correct these figures.

By Mr. Nizer:

Q. Now, looking at the LUCY GALLANT computation, without even putting it on the board let's see if we can do it in round figures. For two weeks—LUCY GALLANT played three weeks—but for two weeks if you had looked at the LUCY GALLANT figure you would have had a gross experience at this same theater of $14,000 and a house expense of $10,300. That is at $150 overtime, not $200, which would have left $4000 in round figures. And if you took 90 per cent of that it would be $3900 film rental, and if you deducted the advertising, which is the actual advertising of $9866 for two weeks—

A. Excuse me, did you say 90 per cent of $4000?

Q. $4000. $4300 to be exact. I left out the odd figures. It is $4342. And the film rental on a 90/10 deal would have been—

A. $3600.

Q. Thirty-six is it?

A. Yes, sir.

Q. All right. If you subtracted the advertising you would have had a loss on this engagement of the offer of the COURT JESTER based on the LUCY GALLANT figure of $4900 instead of the

(6113)

$3000 loss you had on LUCY GALLANT, is that correct?

A. That is correct.

Q. Quickly, without going to the blackboard.

A. Very correct.

Q. So if you had looked at the prior experience that Paramount had on one of its own pictures at the Viking you would have come out with a loss out of pocket on this advertising of almost $5000, wouldn't you?

A. There is no question about it.

Q. Whereas at the Midtown you got a film rental of close to $11,000, the figures he put on there, $10,933, right?

A. Yes, sir.

Q. Mr. Sawyer asked you about two weeks with a possible holdover if the parties mutually agreed. In any case, whether that langauge is used or not, if the parties want to mutually agree to hold the picture over, can you always do so?

A. If you mutually agree to hold a picture over?

Q. With or without a clause.

A. Of course you can.

(6114)

Q. Therefore, when you determine the value of a bid, do you consider it on the basis of what is—what the exhibitor's obligation is rather than what he might agree with you on, if you agree and he agree in the future?

A. Only on the basis of his obligation.

Q. If the exhibitor thought, as Mr. Sawyer just told you, that he would have $12,000 gross the third week, he kept asking you, wouldn't you hold it over, if Mr. Wren thought he would have $12,000 the third week, is it logical to assume he would have offered three weeks instead of two weeks?

A. This would be a logical assumption.

Q. And the comparison that Mr. Sawyer has made on that board was a comparison which not only took the gross

of the Midtown as your gross—though it turns out to be one-half of LUCY GALLANT, isn't it?

A. Yes, sir.

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(6115)

Q. And he also took in his computation with you a comparison of four weeks against two weeks on the theory that you would have done better and you would have agreed with him and he would have agreed with you for four weeks; is that what he did on that computation?

A. Yes, sir.

Q. Do you consider that sound or logical or meaningful, according to your knowledge in the industry of how bids are determined in advance?

A. This is not realistic.

Mr. Nizer: I have only one other matter and I will be through.

By Mr. Nizer:

Q. Mr. Sawyer asked you about various pictures of Paramount, BIRDS AND BEES, and the others. How many of the 87 pictures in which the plaintiff had any interest of all companies—I have given you that list and asked you to make the computation—how many of those were Paramount pictures, your company's pictures, of the 87.

A. I believe there were 13.

Q. 13 is right, sir. Of those 13, have you looked up the

(6116)

records? How many did the Goldman three theatres obtain from Paramount.

A. I did look up the records.

Q. How many?

A. There were seven pictures that they obtained.

Q. Of those seven, how many did the Goldman Theatres obtain by bids, not negotiation, but bids?

A. There were four out of seven.

Q. Mention their names, please, for the record.

A. I made a note to refer my—to refresh my memory.

Q. Refresh your recollection.

Q. May I use this?

Q. Go ahead. You may use it, yes.

A. The COUNTRY GIRL.

Q. Go ahead.

A. MOUNTAIN.

Q. Yes.

A. BIRDS AND THE BEES; THAT CERTAIN FEELING.

Q. All right; so that now we are down to three pictures, Paramount pictures, during the entire period of this suit, which the Goldman three theatres obtained by negotiation; correct?

A. Yes, sir.

(6117)

Q. Now of those three theatres, how many were first put out for bidding, to bid, and the bids were rejected? How many of those three?

Mr. Rome: "Those three pictures." You said, "The three theatres."

Mr. Nizer: Oh, I beg your pardon.

By Mr. Nizer:

Q. Of those three pictures which are left, how many were originally put out for bids and the bids were rejected?

A. I believe two.

Q. What are the names?

A. DESPERATE HOURS and COURT JESTER.

Q. So now we have two pictures, Paramount pictures, in this entire lawsuit, on this entire split; we have two pictures during the two-and-a-half years where the situation arose where pictures were put out for bidding, the bidding was re—bids were rejected and they were negotiated?

A. Yes, sir.

Q. And this is the question which Mr. Sawyer has been putting to you and other witnesses—

Mr. Nizer: I strike out "other witnesses."

By Mr. Nizer:

Q. —to you as to whether in those kind of situations, those

(6118)

two pictures, COURT JESTER and what? DESPERATE HOURS?

A. Yes, sir.

Q. —after the bids were rejected whether you went straight to Goldman or whether you negotiated with everyone—

A. Yes, sir.

Q. —at what is—you have answered that?

A. Yes, sir.

Q. What did you do? What was the practice?

A. We went to everyone.

Q. And in those two instances, I have shown you Exhibits 19, already in evidence, Defendants' Exhibit 19 and Exhibit 31, which you read to the jury this morning—

A. Yes, sir.

Q. —in which the last sentence is, "The bids have been rejected; we will, therefore,—therefore, we will ngotiate with each of you;" is that correct?

A. Yes, sir. That is correct.

Q. And to your knowledge was it the regular practice to do that in every instance where a bid was rejected during the whole period of this Goldman-Stanley Warner split?

A. To the best of my knowledge, without exception.

Q. And when you said before, did you—did Paramount attempt to negotiate with the Viking Theatre, who was it that made the calls and informed you that they had attempted affir-

(6119)

matively in those two cases to—

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Q. —negotiate with the Viking?

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A. Ulrik Smith.

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(6120)

By Mr. Rome:

Q. Mr. Minsky, there has been reference to the advertising of the film THE TEN COMMANDMENTS and the use of billboards in connection with that.

A. Yes, sir.

Q. That picture, to your knowledge, played at one of the William Goldman Theatres, Incorporated theatres, did it not?

A. Yes, sir.

Q. And isn't it a fact, Mr. Minsky, that the billboards that were utilized for the advertising of that picture were in prominent locations around the city, to your knowledge?

A. To the best of my knowledge.

Q. And isn't it further the fact that no revenue from the advertising of these billboards was received by William Goldman Theatres, Incorporteed, in any way whatever?

A. To the best of my knowledge.

Q. Now, isn't it further the fact to your knowledge that William Goldman Theatres, Incorporated, did not specify these specific locations, whether they would be parking lots or anything else, where those billboard displays were

(6121)

to take place, but that Paramount itself had largely to do with the designation of the locations?

A. Generally, this was the unilateral Paramount decision.

Q. Now, there has been reference here further to the fact, Mr. Minsky, that Mr. Sawyer asked you to assume that the Viking Theatre would achieve the same gross that the Midtown Theatre achieved on the picture COURT JESTER.

On the basis of your 31 years in the industry—incidentally, how many of those years have you had to do with matters in Philadelphia?

A. Since '47 or '8.

Q. Now, on the basis of your experience and particularly with respect to your knowledge of Philadelphia, do you take into acount in determining your own opinion and evaluation of the grossing potentialities of a theatre, its location?

A. Yes, sir.

Q. And its management?

A. Yes, sir.

Q. Its operation?

A. Yes, sir.

Q. The experience of the exhibitor who runs the theatre?

A. Yes, sir.

Q. The years in the business?

A. Yes, sir.

(6122)

Q. The performance that the theatre has given over the period of years?

A. It is very important.

Q. Now, on the basis of all those criteria that you do take into account, do you regard the Midtown Theatre as a better grossing theatre than the Viking Theatre?

A. My own feeling in that connection is yes.

Q. Now, there has been also reference by Mr. Sawyer to your recollection of whether or not there was ever an instance to your knowledge in Philadelphia in which an exhibitor came along and offered to pay to Paramount some

portion of a loss that Paramount had suffered on a particular picture. Do you remember that line of questioning?

A. Yes. I do.

Q. And at that time you said that you had no then recollection of whether there ever was such an instance.

A. Yes, sir.

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(6144)

THIRTY-FIFTH DAY

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(6146)

The Court: As I indicated last night, I desire to make several rulings on the motions now pending before me.

First, I desire to rule on defendants' motions urging:

(1) that plaintiff's action should be dismissed, or in the alternative; (2) that summary judgment should be entered for all defendants.

Each defendant has made his motion asking for the relief specified above. All parties defendant have joined in the memorandum filed for defendants, argued by Mr. Nizer June 28, at pages 5415 and following of the notes of testimony, except counsel for Fox Philadelphia and Twentieth Century-Fox for which separate memoranda were submitted, as argued by Mr. Young at page 5465 on the same date, and thereafter. These separate oral motions of the several defendants appear in the minutes at pages 5469 and following.

I propose to discuss this series of motions generally in the first instance, although, as I said, I recognize that there is before me a series of individual

(6147)

motions to dismiss or for summary judgment by each one of the defendants.

The following discussion is based upon a reading of all cases and authorities submitted by the moving parties and has to do, first, with Authority for Granting Smmary Judgment.

My conclusion as to that, briefly, is—whatever the practice may be in the District of Columbia, as shown in the Riss case, infra—the only appropriate method of dismissing any defendant from the case at the present stage, after several weeks of this jury trial, would be by directing a verdict.

The first case cited by defendants is Riss & Co. v. Ass'n of American Railroads, decided by a United States District Court for the District of Columbia, appearing at 190 Fed. Supp. 10. As the case clearly says, citing cases from the District of Columbia, in that circuit, summary judgment may be granted on evidence that would require the direction of a verdict.

But the difference was simply one, as I see it, of terminology, for the judgment was merely as to certain counterclaims made by defendants. As to those counterclaims, the fact of damages was not shown at all and defendants had no more evidence to offer. As the opinion

(6148)

said at 190 F. Supp. 14:

"For all practical purposes, these counterclaims, insofar as the damage aspect is concerned, are at the same stage as if they had been actually tried."

That is not our present situation.

Once the matter has gotten beyond the motion-for-summary-judgment stage, and testimony has been started, it is—in the light of this Court's research—unheard of to shut a party off until he has had a chance to make his case. Analysis of the cited authorities does not show any instance to the contrary; that is:

Taking the cases set out in defendants' brief as argued by Mr. Nizer: Chandler Laboratories v. Smith, 88 Fed. Supp. 583. No testimony was taken; discovery and requests for admissions showed the plaintiff's position was frivolous. That is not our case.

In Oscanvan v. Arms Co., 103 US 261, after opening statement the Turkish Consul-General was thrown out of court on his claim for large commission from arms manufacturer who had made sale to plaintiff's own Turkish Government. Defendant had undoubtedly been hesitant to plead illegality of its contract, but the Federal Court

(6149)

directed verdict before any testimony.

Next, Rotberg v. Dodwell & Co., no testimony was taken. The real question was whether it was summary judgment or judgment on the pleadings, it seems. It was decided on the pleadings and affidavits. Again, not our case.

Durham Chemical Co. v. Borax Consolidated, Ltd., by stipulation, motions to strike and to dismiss were to be treated as motions for summary judgment, and where trial on the separate and special issue of statute of limitations was directed, the court could grant judgment when it became so clear that the action was barred that any verdict to the contrary could not have been permitted.

Now, the other cases cited are either non-jury cases or are judgments before testimony taken.

I find that, speaking in technical terms, I must deny all motions for summary judgment because that form of disposition is procedurally inappropriate, in my judgment.

As to the motions that plaintiff's action be dismissed, I shall treat those motions as motions for directed verdicts.

It has become clear that as to one of the

fendants, there is not and—in the opinion
—could not possibly be any evidence which
rt a jury verdict. As to that defendant,
l on the record as RKO Teleradio Pictures,
y RKO Radio Pictures, Inc., I shall direct
nd a verdict for that particular defendant.
onnection I have considered carefully the
ief in which he has submitted the evidence
ve been presented against RKO, and also
which he intends to produce. It is fair to
purposes of the record, that the showing
to RKO made in that brief consisted of but
ragraphs.
ee RKO pictures were the subject of testi-
NESSEE'S PARTNER and two others.
en had testified to the superiority of
r on that picture, TENNESSEE'S PART-
ubsequent testimony on cross-examination
ny basis for an inference that the award to
Theatre of that picture, TENNESSEE'S
was not made as an ordinary exercise of
gment. As to this picture, there was no
its award was the result of any split.
testimony as to the RKO pictures

VELING SALESLADY and BEYOND
ABLE DOUBT, to the initial effect that
fused to deal, was on cross-examination
ave been withdrawn and must be consid-
effect.
as some testimony that two of the de-
bitors had something in the nature of a
pictures, and plaintiff has referred to a
er split record. Only one RKO picture,

DEATH OF A SCOUNDREL, appeared on that record, and that picture was played after the period of the suit. Especially, since this Court has already ruled that there is no necessary illegality in such a split, those references to a split are certainly not evidence that defendant RKO was guilty of any wrong, as charged.

For the foregoing reasons, I am directing a verdict forthwith in favor of defendant RKO, and shall so instruct the jury upon its return to the courtroom this morning.

I reserve my rulings on the separate motions of defendants United Artists, Universal and Fox-Philadelphia. As those three motions I make no ruling at this time.

As to the motions of all other defendants, the motions for directed verdicts are denied.

(6152)

Next I desire to rule on the question of the admissibility of the so-called Hugh Owen memo.

The plaintiff desires to introduce into evidence a memorandum prepared by Hugh Owen, Vice-President and Sales Manager of Paramount Film Distributing Corporation, dated January 13, 1956, which was addressed to George Weltner, President of Paramount. Defendants object to its admissibility predicating their argument on the theory that the letter is purely hearsay and that since it does not fall within any hearsay exception it is inadmissible.

This Court rules that the memorandum falls within the Business Records exception to the Hearsay Rule and is therefore admissible. The Federal Statute provides in part:

"In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any

act, transaction, occurrence, or event, shall be admissible as evidence of such an act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event, or within a

(6153)

reasonable time thereafter."

28 U.S.C.A. Section 1732 et seq.

Defendants contend that the intro-corporate memo does not constitute a "busines record." Upon immediate reflection, it is evident that the Statute does not restrict "business entries" to notations in books of record, rather the Statute encompasses "any writing or record." To say that the Statute applies only to formal books of records and account is to apply an unrealistic standard to the Statute, in my opinion. This Court follows the approach taken by Judge Wyzanski in United States v. United Shoe, 89 Fed. Supp, 349, where that court admitted a wealth of intro-corporate letters and memos under the Business Records Exception.

Defendants further contend that the memorandum was not made within "the regular course of business." To this proposition, the Court cannot agree. It is a perfectly normal and regular function, at the executive level, to have corporate officials exchange information in order to expedite corporate affairs. This is especially true in the instant matter since it appears that Owens obtained the information contained in the memo upon solicitation and at the request of his fellow corporate official and superior.

(6154)

Defendants further contend that Owen's knowledge is based on hearsay. Firstly, this Court differs

with this interpretation of the memo, since Owen, in an unequivocal manner, stated "This arrangement, whether authorized or not, was actually in effect." To me this is a fact. But notwithstanding this, defendants' objection on this score can only impugn the weight of the document rather than its admissibility.

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(6157)

Mr. Sawyer: Well, Your Honor, we will concede that this—this document, yes; this document is offered only as to Paramount.

The Court: Yes, I would think so.

Mr. Sawyer: It has to be, the document.

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(6174)

Mr. Nizer:

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(6175)

Your Honor will recall that when Mr. Goldman

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was on the stand and due to the fact that his—and I would move to state this off the record—under sedation due to his back injury, he was at times under great difficulty and pain, and he made an answer that all of the Stanley Warner pictures went to Stanley Warner, or something like that, and Your Honor said, "Well, we know the record is to the contrary in this case. We won't fool around with that answer. It just isn't correct on the record." And everybody agreed it was correct.

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(6183)

The Court: Well, as I said to Mr. Wolf, I admitted the document in toto. Now, in considering it I

(6184)

thought carefully about my understanding, which does not mean anything, I know, as a matter of law, but then he says. This arrangement, whether authorized or not, was actually in effect.

I agree with you, Mr. Nizer, that there is nothing in the case which says it was in effect. It has not been proved to be in effect. But, if that is not so, then you will have to contradict it.

Mr. Sawyer: Your Honor, I have not quite finished on the subject yet. Because there was this statement, and, without rearguing it, I must indeed correct it. It must have escaped Your Honor's notice when we read from Mr. Schwalberg's deposition, because Mr. Schwalberg, the man who preceded Mr. Weltner as president of the corporation, stated exactly this, if I may read it, just this paragraph, to Your Honor, and this was read to the jury, Your Honor, and this was part of the deposition.

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(6198)

The Court: Now, what is the situation?

Mr. Nizer: We sent for Mr. Smith. You see we weren't sure we would need him, so he is on his way. He is subject to phone call not far away. He will be here momentarily.

Mr. Sawyer: I will not call Mr. Smith.

Mr. Nizer: Oh, no.

Mr. Sawyer: I am ready to proceed with Mr. Mansell, Your Honor, as requested by the defendants. I am ready now to proceed.

Mr. Ward: Do you mean by that you will not call Mr. Smith today?

Mr. Sawyer: I will not call Mr. Smith as part of the plaintiff's case.

Mr. Nizer: Then I am going to earnestly renew—I think that this is an attempt to play with this situation, to exploit it improperly and not to get to the facts.

Mr. Sawyer: It is not.

Mr. Nizer: The whole thing, the whole situation here is out of sequence at the plaintiff's request. Mr. Minsky was on the stand, his name is referred to in the

(6199)

Hugh Owen memo. Not a question is asked of him about it, and he is released. Mr. Smith is put upon our list as a witness and was to be the next witness and has been available for days. Then when Your Honor makes this ruling and counsel hears that this is a pure hearsay matter which is contrary to the record and that Mr. Smith who is the next witness in regular order will have at least an opportunity, which is the least the defendant should have under this ruling, to state what the fact is over again—Mr. Minsky did, the plaintiff put in that evidence, he put in the documents, and plaintiff seeks to trifle with that now by withdrawing him as a witness.

I earnestly renew my application for a reconsideration of the ruling, particularly with respect to the hearsay statement which plaintiff does not give us an opportunity under his own schedule to pin down as accurate or inaccurate. That is the least the defendants are entitled to.

I think this is toying with tactics, Your Honor, rather than with the objective of a trial, which is to establish the facts.

There is one sentence here I bring to Your Honor's attention, "My understanding is . . . ." That sentence beginning with "My understanding is," which is contrary to

(6200)

the record and which Mr. Smith, who is the branch manager here, knows is not the fact of what this alleged understanding is.

The Court: How long has Mr. Smith been here?

Mr. Adams: Three or four days.

Mr. Nizer: Three or four days, every day this week, because we weren't sure when he would be reached. You know, we didn't know Minsky would go on as long as he did.

The Court: Of course, Mr. Sawyer,—

Mr. Sawyer: Your Honor, that has nothing to do with this ruling.

The Court: Pardon me?

Mr. Sawyer: Your Honor, that isn't at all fair. It has nothing to do with what Mr. Nizer said. It doesn't depend on this ruling, Your Honor.

We sat down and I informed the defendants as long ago as yesterday morning, and I think perhaps Wednesday afternoon, that I was going—first of all let me say this, Your Honor, if I may. I spent a good bit of time over the long holiday that we had on the case, but one of the main things I did was I went back, because as the case had developed I hadn't had a chance to go ahead and see what was it that these other witnesses would say, and I went through them and my thought was perhaps I can eliminate some

(6201)

of them, perhaps I can just read from depositions. And the one that it seemed most likely that I could do that with was Ulrik Smith, because of the number of Paramount witnesses. We have had more from Paramount

and there were scheduled more than from other companies. For instance, for Warner, Mr. Mansell is the only one, and so on.

I then took I might say a very close look at Columbia, where again there were two witnesses, both Mr. Weiner and Mr. Wurtele, and said to myself, "Can't I at least eliminate one of these?"

Now, I did it, Your Honor, undoubtedly motivated by self-interest. I think it becomes a disadvantage to the plaintiff to put on repetitious people or put on too many or to have the case go too long. I came to the conclusion that we could probably do with Ulrik Smith. We then sat down, as we all know, and began to negotiate back and forth on depositions. Mr. Adams and I went over it last night.

Now, that the ruling of Your Honor has nothing to do with it. In other words, we had an opportunity here to agree on whether or not Ulrik Smith could be presented by deposition. In the light that he cannot, my second choice on Ulrik Smith was to eliminate him, as I would hope to eliminate perhaps another witness. Whether we have a

(6202)

deposition agreement or not I may be able to eliminate him.

Now, the defendants have a time to put on witnesses. The defendants can put on evidence. There is no problem about that. Your Honor is very mindful of the fact that when you call adverse witnesses and under Your Honor's ruling they have a right to cross-examine, of course there is a disadvantage as opposed to the direct.

The Court: I understand that, Mr. Sawyer. My other thought is that it is a little bit unfair at your request to have a man in court for three or four days and then suddenly decide not to call him.

Mr. Sawyer: Your Honor, I don't know why he would be here any such length of time because Wednesday morning we started out and Wednesday morning we had a witness then scheduled. We had two witnesses ahead of him; we had Mr. Schwalberg. That was agreed to. Nobody could conceive that he could have been reached Wednesday.

Now, the fact that he was here yesterday—I don't doubt that he was here Wednesday, perhaps he was—but that he was here yesterday was probable or possible or something like that, but as they point out to me, the man has been here for weeks and weeks before that and nobody said he was going to be called. If he is here he may be here for other reasons but not because he was coming up on

(6203)

this thing. Yesterday would have been the first day he conceivably would have been needed to have been here possibly because we couldn't possibly have reached him Wednesday, and before that we were on this vacation.

Mr. Nizer: Your Honor, this is rather ingenuous. Mr. Sawyer would have us believe now that over the weekend he was thinking over about saving time and that that is the reason he is not calling Mr. Smith. Two minutes before we held our conference and decided to call Mr. Smith who has already arrived in this courtroom Mr. Sawyer said, "No, I won't go for that. Either we read the deposition or Mr. Smith will go on. I am not going to make that adjustment."

Mr. Sawyer: I didn't say that. If you will look at the record, I didn't say that. I said either we will be able to agree on this deposition or we won't, and it is perfectly understandable, Your Honor, isn't it true that if I had said, "Well, I am not going to call him at all"

there wouldn't possibly have been an agreement? The only way to reach an agreement on this deposition was under the understanding that we could thereby eliminate time. Now, that is just simply as much to your interest or to mine as to the defendants. I don't think that I should be

(6204)

reproached. We are going to save time now, and I am not calling Mr. Smith and there may be other witnesses I will decide not to call.

Mr. Nizer: It isn't a matter of reproach, it is a matter of fair dealing and good faith with the Court.

It seems to me that this decision not to call Mr. Smith was due to the fact that Your Honor's ruling has put into evidence a statement which Your Honor at least feels we ought to have an opportunity of establishing the facts about. And Mr. Sawyer never gave any indication except as a pure bit of trial tactics to not call Mr. Smith, who has been here for several days.

We can't evaluate the time elements here so closely and we cannot be criticized for having complied with the plaintiff's request that these witnesses be here. We have had several of them here several days in order to play safe and not waste the Court's time if suddenly a witness should go off.

For example, take that incident with Mr. Schwalberg, who suddenly went off as a result of a situation that developed. We were ready with other witnesses. Mr. Minsky was seated here. What would have happened if I had said, "Minsky, you come the next day." We would have had no witness here.

(6205)

We have been complying in spirit with this matter. Now here is the situation where one sentence stands in

the way of a complete stipulation. I am unhappy with any stipulation substituting the deposition for Mr. Smith because in our judgment his appearance, his integrity and standing—he is well known in this territory—is such that he ought to be seen by Your Honor and the jury. In order to save time we downed that spirit within us. This was a definite conviction of all counsel, that we are making a great error in not exposing this man to the jury. But then when we asked for the simple additional facts that he negotiated with Mr. Wren, which is conceded by Mr. Wren, that he called him and that he did send out these letters and this was the uniform practice, we have agreed on the whole stipulation except one sentence, he says no, and then we want to call Mr. Smith and he says no. Now, I don't think that is fair.

Mr. Sawyer: Mr. Wren doesn't concede that.

The Court: Mr. Nizer, I can't direct the plaintiff to call a witness that he doesn't want to in his case. I couldn't do that.

Mr. Nizer: No, but would Your Honor call Mr. Smith as your witness? It has been done frequently.

The Court: I couldn't do that, either, no.

(6206)

Mr. Nizer: The Court has a right to do so, and many a witness has been called when the Court says, "You bring so-and-so here. I want him on the stand."

In view of this hearsay document it seems to me that the least we are entitled to is to have Mr. Smith, who is on the ground, tell us what the fact is. May we apply to that?

The Court: No. I never do that unless I feel there might be a miscarriage of justice.

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(6218)

Mr. Sawyer: Your Honor, this document has been marked P-8 and I now offer it in evidence, and I would ask to read it to the jury, sir.

The Court: Very good.

Mr. Wolf: That is objected to.

The Court: Well, this is the Owen—

Mr. Sawyer: Yes, sir.

The Court: Oh, yes.

Mr. Sawyer: It is a document that has been marked P-8—

The Court: Overruled.

Mr. Sawyer: —members of the jury, and it is a document, a photostat of a document which has at the top in printing the words, "Inter-Communication," with on each side the seal of the Paramount Corporation, and it reads as follows:

"To Mr. George Weltner"—and it is agreed that Mr. George Weltner is the president—at this time was the president of the Paramount Company, succeeding Mr.

(6219)

Schwalberg—and it then says, "from Hugh Owen"—and it is agreed that Mr. Hugh Owen was vice-president and general sales manager of Paramount at the time this memo was written. It then says, "home or branch office," and that is printed, but nothing is filled in; and then it says, "date," and the date given is January 13, 1956, and the memo reads as follows:

"Dear George:"—

Mr. Nizer: Your Honor, it is not agreed that he was a general sales manager when this was written. He

was not in charge of this territory at all, sir. That was —first of all, you were supposed to just read it and not interpolate your —

Mr. Sawyer: Vice-president.

Mr. Nizer: That is an error. Will you please take that back?

Mr. Sawyer: Vice-president.

Mr. Nizer: Yes. He was not a general sales manager. May have been the vice-president. I don't know.

Mr. Sawyer: He was vice-president, I understand.

Mr. Nizer: Later. No. Would you be good enough to take back your designation? That is not a part of the document that you are reading. Will you please read the document.

(6220)

Mr. Sawyer: We got it, I believe, from "Motion Picture Manual," if you will just give me a minute to look it up. It is a note from this year.

Mr. Ward: That is not in evidence.

Mr. Nizer: That is not in evidence and it isn't the fact.

Mr. Sawyer: Well, then simply vice-president of the Paramount—

Mr. Nizer: No. He wasn't that, either.

The Court: Well, was he an officer, Mr. Nizer?

Mr. Nizer: No. He became one—not at that time, not at the time of that memorandum, Your Honor, as we understand it at this moment—there is no testimony on this—and therefore I think that he ought to read the document, Your Honor. There is no right to—

The Court: Yes.

Mr. Sawyer: Can I show you this photostat?

Mr. Nizer: No, no. I don't—

The Court: Yes, if there is no evidence as to who he is and you can't agree as to what official position he had.

Mr. Sawyer: Well, Your Honor, this is a late date. We all put this in our briefs, what he was, and so on. I could not—

(6221)

Mr. Nizer: No, no, no.

Mr. Sawyer: If they don't know who the people are, it wouldn't mean very much. I didn't think that—I didn't know that there ever was any disagreement.

The Court: Well—

Mr. Sawyer: Your Honor from the bench even said that when we were arguing the thing this morning, and there wasn't any voice raised then that Your Honor's statement, which was identical to mine—you said the same words I did, and then to break the thing up with this objection at this moment—

Mr. Nizer: No.

The Court: No. Well, he—

Mr. Sawyer: I will later show his exact title.

The Court: Well, some man in some official capacity.

Mr. Sawyer: Yes, sir.

Mr. Nizer: May we ask—

Mr. Sawyer: Of Paramount.

: —that counsel's statement, that his Mr. Hugh Owen be stricken out with nt, that that was an error?

r: No. I don't concede that it was an

All right. It will be stricken out.

: It is stricken out?

Until it is established.

It is stricken out?

Yes.

Thank you, sir.

: Now, this communication reads as

-called 'Schwalberg agreement' with ladelphia envisaged an equal division, quantitatively, of our product between anley Warner in Philadelphia.

arrangement bids were invited from and Goldman, as well as other theatres requesting a bid invitation. If any le the acceptance closed the sales file. cceptable, Paramount agreed to ne- er Stanley Warner or Goldman, gov- r the individual picture was on Gold- Warner's split.

tanding is that we were not permitted, jected, to negotiate with

bidders or any other theatre that did We were obligated, upon rejection of

all bids, to negotiate with one or the other, and I am told that, in one or more instances, the negotiated deal was reviewed or adjusted.

"This arrangement whether authorized or not, was actually in effect.

"2. Mr. Weltner was successful in having Mr. Goldman agree to an amicable cancellation of this agreement. A future selling arrangement was left open.

"3. I, accompanied by Howard Minsky, our mid-eastern division manager, met with Goldman in his Philadelphia office by appointment at 12:30 P.M. Thursday, January 12, 1956. Also present at this conference was George Beatty and Schuyler Beatty of the Goldman staff.

"A new proposal was suggested and finally agreed to by Goldman and his associates, subject to your approval.

"Under the new proposal Paramount continues to split its product between Stanley Warner and Goldman, which arrangement has been declared acceptable. Then bids are invited from all theatres. Goldman stated he would continue his present policy of not bidding for any of our pictures (or any other

(6224)

company's pictures for that matter). It occurs to me that we may invite Goldman to bid but that we cannot make him bid.

"Under this arrangement if there is an acceptable bid our sales file is closed. If there is not an acceptable bid, Paramount may negotiate with any of the unsuccessful bidders. If there are successful negotiations our sales file is closed. If there is not an acceptable bid and if there are no successful negotiations, Goldman invites Paramount to negotiate with him. We may or

may not choose to do so. If we choose to negotiate, we are under no obligation to accept an unsatisfactory offer. If successful negotiations are concluded with Goldman, it is understood that regardless of performance results there will be no review or adjustment.

"Hugh Owen"

Initialed "HO."

Mr. Sawyer: Mr. Mansell.

(6225)

WILLIAM G. MANSELL, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Sawyer:

Q. Mr. Mansell, by whom are you employed?

A. Warner Brothers Pictures Distributing Corporation.

Q. And in what capacity?

A. Branch manager of the Philadelphia office.

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(6230)

Q. Let me put it this way, because I didn't mention the name: Who was it, if anyone, in Warner Brothers, who determined who in first-run Philadelphia, of the exhibitors, was going to be on the split? Was there someone who made that decision in Warner Brothers?

A. You mean Warner Brothers Distributing Corporation?

Q. Yes.

A. Oh, you mean in the—

(6231)

Q. Your employer, yes.

A. Yes, oh, in the distribution you mean. No. There wasn't any determination made t re, other than the Stanley Warner and the Goldman theatres were going to split the product. Now, that didn't give them exclusive use on the pictures.

Q. Yes, I know, Mr. Mansell.

A. I mean, it still left the product open for competition in the rest of the area.

Q. I thought that—wasn't there a Mr. Lapidus in Warner Brothers who made this decision with respect to having Stanley Warner and Goldman on the split?

A. I couldn't really say who made the decision, as to who would make the—that is, who made the decision to split the product, that was done in New York, and then I get it—I got it through a telephone call.

Q. Well, didn't—wasn't your Mr.—your immediate superior Mr. Lapidus?

A. What? I beg your pardon?

Q. Wasn't your immediate superior Mr. Lapidus?

A. Yes.

Q. And the question I put to you is precisely this: Wasn't it he who determined who among the exhibitors in first-run downtown Philadelphia is going to have the right to split product? Wasn't it Mr. Lapidus who decided that?

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(6232)

Q. Did you testify, Mr. Mansell, under oath as follows:

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Q. "Q. Well, who determines who is going to have the right to split in downtown Philadelphia?

(6233)

"A. Well, in this case it was determined, I would

say, by Mr.—by my immediate superior at the time, Mr. Lapidus."

Is that correct?

A. That could be correct.

Q. All right.

A. Yes, sir.

Q. And did—was it true that after this arrangement had been made that Goldman would—I am not speaking about other bidders now, Mr. Mansell—but that Goldman as compared with Stanley Warner would get the picture if it was on his side of the split even if in your opinion it would gross more at a Stanley Warner theatre?

A. Yes, sir. He would.

Q. And were there instances where your would have that opinion that the motion picture, had it played at a Stanley Warner, at a particular one, might have grossed more?

A. In which theatre?

Q. In any of them.

A. I don't quite understand your—

Q. Were there—were there times in your judgment a picture on Mr. Goldman's side of the split might have grossed more in a Stanley Warner theatre?

A. Yes. Oh, yes, sir. Yes. That could happen.

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(6234)

Q. I will repeat it, sir. Were there times—were there ever occasions when pictures were awarded to any of the theatres in the Goldman Theatre, Incorporated, on which they did not submit any offers?

A. Yes, sir.

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(6235)

Q. If an independent exhibitor, Mr. Mansell, wanted to get in on the split, would he be afforded that opportunity?

A. Well, he would be given an opportunity to compete for the pictures, yes.

Q. Oh, no. I know he would be given opportunity to compete, but would he be given an opportunity to get in on the split?

A. No, sir. I don't this he would.

Q. No, sir.

And were all the Warner Brothers pictures split after this arrangement was entered into?

A. Yes, sir.

Q. And if—

A. You talking from 1953?

Q. Back from the time; yes, sir.

A. Yes.

Q. And if the Viking was invited to bid on a picture or chose to bid on a picture, in each event they would be com-

(6236)

peting, would they not, with either the Stanley Warner chain or the Goldman chain, depending on whose side of the split the picture had been assigned?

A. They would be competing with every theatre—

Q. With everybody.

A. —plays downtown first-run Philadelphia, because we send the blanks out to all of them—that is, all the first-run accounts.

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(6237)

Q. I am now going to ask you one or two questions about what would happen if a motion picture, having fallen on the Goldman side of the split, was not one in which any other exhibitor had showed any interest. Now, would you then go to Mr. Goldman and seek to negotiate that picture to him?

A. Yes, sir.

Q. And did he sometimes wish to pay less than what you wanted to get for the picture?

A. Which is—that is natural.

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(6239)

Q. Now, in this situation where you have nobody else interested and you would like to get more money for the picture than Goldman wants to pay, you never said to him, did you, "Well, if the picture isn't—if this picture isn't worth it to you, I will go over to the Stanley Warner people and offer it to them"?

A. No. I never said that to him, because I was always able to work out a deal with the Goldman people or Stanley Warner.

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(6246)

By Mr. Sawyer:

Q. Now, Mr. Mansell, do you recall that the Viking requested a share of the Warner Brothers product early in 1954?

A. No, not in the early part of 1954, no, sir.

Q. You do not recall that in April, 1954 Warner Brothers received a written request from the Viking with respect to an opportunity to share in the Warner Brothers product?

A. Not in April, 1954, no, sir. The first indication I had that they were interested in the product was in October.

Q. And if there was such a letter it was not ever brought to your attention then, you being in charge of the Philadelphia area; no such letter was brought to your attention, sir?

A. An early dated letter?

Q. Yes, one dated in April of 1954.

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(6247)

Q. I show you a letter—I will ask him what the date of it is.

What is the date of that letter?

A. April 8, 1954.

Q. Will you just take a look at it at your leisure at your convenience, and I will ask you—

A. I remember this letter, about getting a letter like this in April.

Q. Oh, all right.

A. But that is not a request for—I didn't interpret it as a real request for any product.

Q. You did not so interpret it?

A. No, sir.

Q. Well, doesn't it say here, desires—the Viking Theatre Corporation desires to share your product, or the right to bid upon the same for exhibition by it, the corporation, in the central city area of Philadelphia?

A. It says that? Did you just read that from the letter?

Q. Yes.

A. Then it says it.

Q. Then we agree to that.

(6248)

A. O.K. But that letter was written in April.

Q. Yes.

A. The theatre was under renovation. I didn't know when it was going to open, so I didn't interpret it as a real request. I just waited.

I remember the letter. I must admit that, sir.

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Q. Didn't you assume, Mr. Mansell, that this letter was a request, as it says, to share your product, or the right to bid upon the same at such time as the Viking, undergoing renovation, would be open?

A. I didn't, no, sir, not at that time. The theater wasn't ready. They were renovating it. I didn't know when they were going to be ready. So I didn't pay any attention to the letter at the moment.

Q. Well, it is—

A. I didn't throw it out the window, you know, I filed it and

(6249)

held it.

Q. It states, does it not, that the theater is now being completely renovated, redecorated? I don't want to prevent you from seeing it.

A. Yes.

Q. Redecorated, air-conditioned, and will include the latest motion picture equipment, CinemaScope and stereophonic sound.

A. Yes.

Q. It will be completed and ready for opening on or about May 8, 1954.

• • •

By Mr. Sawyer:

Q. And then it goes on to ask for product. Now, didn't you understand that that meant that at such time as the theater opened they would wish to have an opportunity to show Warner Brothers pictures in that motion picture theater?

A. Well, they wouldn't be ready, I figured they wouldn't be ready by May 8, so I didn't get interested in it at the moment.

Q. Do you know in fact—you knew when it opened? You were aware of its opening, were you, when it opened?

A. In July?

Q. Yes.

A. Oh, Yes, sir.

(6250)

Q. And didn't you assume that it having opened they were anxious to show Warner Brothers pictures?

A. Well, no, I assumed the opposite. I assumed that they weren't interested in Warner Brothers pictures, be-

cause they had at that time contracted for pictures from other companies, which I had learned about.

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(6251)

Q. Was the Viking allowed to be in on the split?

A. Well, they never expressed any willingness that they wanted to get in on the split down there, and, besides, I couldn't permit it, the theaters themselves would have to agree, that is, among themselves, who was going to split the pictures.

• • •

Q. I say, didn't you testify that no one was permitted to be on the split except Goldman and Stanley Warner? You so testified, did you not, sir?

A. I don't recall. I don't recall testifying to that.

Q. And that nobody was given an opportunity except those two

(6252)

companies?

A. They are the only two people that expressed any desire to split the pictures downtown. Nobody else was in on —made any request.

Q. And what did you think it meant when the Viking Theatre said that they desired to share your product, or the right to bid upon the same?

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Q. How did you interpret that, Mr. Mansell, that request on the part of Viking?

A. This one?

A. Yes.

A. Well, I didn't put any interpretation on that letter. I didn't acept it as a real request for the pictures. The theater wasn't open, it was undergoing renovations, and I just filed—held it in abeyance.

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(6254)

Q. I asked you whether or not it isn't true that if there had been no split, and Goldman had been bidding against the Stanley Warner for Warner Brothers pictures, that wouldn't have put ultimately more money in the pockets of your company if they had been bidding against each other?

A Oh, if there were bidding—if they were bidding, rather.

Q. Yes.

(6255)

A. (continuing) Against one another it would in my opinion result in more money. No question about it.

Q. For Warner Brothers?

A. Oh, yes.

Well, that is what I am talking about.

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(6256)

Q. I am referring now to this letter. Did you actually offer any Warner product to the Viking at the time it opened or thereafter, or, if not, when did you first offer Warner product to the Viking?

A. I believe it was in the early part of November of 1954. It was in the month of November of 1954 that I offered Viking three pictures.

Q. And one of those pictures was TRACK OF THE CAT, was it not?

A. Yes, sir.

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(6257)

(The following occurred at side bar:

Mr. Sawyer: I offer to prove, Your Honor, that having had—well, he has already answered that—that after this letter the first suggestion or offer he ever made to the Viking about a motion picture was the pic-

ture TRACK OF THE CAT, on which he had a meeting with Herman Comer on November 8, 1954.

The Court: Who is Herman Comer?

Mr. Sawyer: He was then the manager, Your Honor, of the Viking Theatre. He was the manager for a few months in there.

That he offered TRACK OF THE CAT, and that that was only after the Goldman Theatre had contracted for that picture by a contract dated 10/29/54—October 29, 1954—which Mr. Goldman had canceled; that then, and then only, did Warner go to Viking with TRACK OF THE CAT. That is the offer.

Mr. Goffman: I object to the offer, Your Honor.

(6258)

The Court: In other words, you are going to show that Goldman had a contract for it?

Mr. Sawyer: Yes, sir, a signed and sealed contract for it, dated October 29, 1954.

The Court: Then Goldman did what?

Mr. Sawyer: That was canceled. This witness won't know all the circumstances of that, but that was canceled.

That thereupon, on October 11, they not having gone anywhere near the Viking with a picture, offered TRACK OF THE CAT to the Viking.

It is true, and I would state in all candor that at that time the Viking said they were committed to play ATHENA, and in that sense Mr. Goffman is right, we do not complain that the picture was not licensed to us. This is merely showing a pattern of operations first run Philadelphia in terms of who had first opportunity and inside opportunity on pictures. That is all it is offered for, just what I have stated.

Mr. Goffman: Let me say, Your Honor, first, that the facts that Mr. Sawyer stated are not accurate, and although I do not think it is necessary to state what the accurate facts are, there nevertheless never was a contract, there was an application, but be that

(6259)

as it may, I object to this offer of proof on the ground that the Viking was not interested in this picture, stated it was not interested in this picture, and the fact that there was or wasn't any prior negotiation with Goldman for the picture is immaterial.

If anything, the fact that it was offered to him after having been under some negotiation with others, is an answer to any grievance about not offering him any product, and the best reason of all, Your Honor, is that this is not among the 87 pictures that Your Honor has ruled on in this case.

The Court: I do not know about that, Mr. Goffman. Here this is not offered as a complaint that he was deprived of something.

This is being offered, as I understand it, to show whether when Mr. Mansell offered a picture to the Viking he was sincere in his offer, that he gave him the same opportunity.

Mr. Goffman: Well, his offer of proof shows that, Your Honor. May I state that; his offer of proof said that before offering it to the Viking they had canceled—this is what he said—the contract with the Goldman. Therefore, he was perfectly free to offer it to the Viking, therefore he was perfectly sincere, and

(6260)

the Viking could have had the picture by saying, yes, and agreeing to whatever reasonable terms there were, and he turned it down.

Mr. Sawyer: Well, that is true.

The Court: Well, why can't he ask why he didn't offer it to the Viking along with everybody else?

Mr. Goffman: Because when it was offered to him he had no interest in it.

The Court: No, when it was offered to the Goldman, why wasn't it offered to the Viking before the Goldman had made a contract for it?

Mr. Goffman: Well, the Viking had made no request for product, except this lawyer letter that was sent back in April, and the witness has stated that he did not consider it a real request, and when it becomes necessary it will be developed from hi mas to why.

The Court: So therefore he finally in October offered him the three pictures.

Mr. Goffman: That is right, and Mr. Sawyer knows why, because in October the theater itself wrote a letter asking for product, and he immediately went to Mr. Comer and offered him, not this one, but four pictures, all of which they turned down.

Mr. Sawyer: I think it was three, wasn't it?

(6261)

Mr. Goffman: It was four.

Mr. Sawyer: All right.

Mr. Goffman: They offered them all to him. So there was no problem about when the real request came in that product was offered.

They are raising an issue now in this case that does not exist.

Mr. Sawyer has never claimed here that he was denied an opportunity of getting any pictures. His

s that when he made offers they weren't awarded
y he thinks they should have been.
ow, this is a perfect case where he was offered
re, he elected not to take it, the fact that it had
alked about to somebody else or not is totally
rial, because they were able to give him the pic-
hen they offered it to him.
his own offer of proof he said that if there had
contract it was canceled. We say there wasn't
contract, there was an application that was never
ed. But, be that as it may, either way, they were
give him the picture they offered it to him; he
it down.
erefore, it is out of the case, like all the other
s that have been presented before Your Honor

he ruling has been that there wasn't a real pres-
n of an opportunity to get the picture and an
ade, then it is out of this case. Otherwise we
ng to go way beyond this record if we have to
other pictures which for some reason he de-
ot to make an offer for.

e Court: Yes. But my only thought is that when
offer it to the Viking, was it a sham?

. Sawyer: No, I do not think so. No, I am not
laiming it was a sham, Your Honor.

e Court: What is your claim?

. Sawyer: It is a little different than that.
viously there were negotiations for this picture,
ust have been in October, because you end up
license agreement, I thought, or at least an ap-
n dated the 29th of October, and then to come
to the Viking on the 11th of November and offer
s for Thanksgiving, well, of course, a theater is

almost sure to be committed by that point, you see. It is the timing.

In other words, you come around and make your gesture on November 8, and we say: Well, heck, by this time we are committed to play ATHENA for Thanksgiving, as any theater is likely to be.

(6263)

Mr. Goffman: Well, have you made any complaint about this?

Mr. Sawyer: That is right.

Mr. Goffman: You have not made any complaint. We have said that—

The Court: How do you answer that?

Mr. Goffman: I say this, at that time we answered immediately the request.

The Court: That you should have offered it at a reasonable time so that it could be played at Thanksgiving.

Mr. Goffman: I am telling Your Honor the evidence is that Mr. Sawyer knows that on October 25 the Viking, for the first time, wrote a letter asking for product, and they responded immediately. They offered him whatever four pictures there were then.

Now, that covered Thanksgiving, it covered Christmas, it covered New Year's, as the memorandum will show.

Mr. Sawyer: It did cover other pictures for other times. It covered Christmas.

The Court: In other words, your thought is now, Mr. Goffman, that when they got this demand they offered the pictures that they had available for exhibition.

(6264)

Mr. Goffman: Exactly.

The Court: Even though this was negotiated for or there had been some conversations with Goldman?

Mr. Goffman: Exactly, and that is a normal thing.

The Court: I think you have a point.
Sustained.

Mr. Sawyer: All right. You have the offer, Your Honor.

The Court: Yes.

Mr. Sawyer: I think that these questions are likely to be objected to, and since I think they at least are in the gray area of Your Honor's ruling, I may as well make offers on them now instead of running up each time.

The Court: Yes.

Mr. Sawyer: The next one I would propose is this, to prove through this witness that in the case of MR. ROBERTS it was offered to the Viikng on May 23, and that that offer was not made in good faith, because at that time Universal had licensed the motion picture TO HELL AN BACK on a license dated May 19, four days previously, which license says, "To follow MR. ROBERTS," both of those being in the Mastbaum Theatre.

(6265)

Now, if Your Honor follows that—I do not know if I expressed it clearly.

The Court: No, I do not think you did.

Mr. Sawyer: It is my fault.

The Court: No, it is not your fault, Mr. Sawyer.

Mr. Sawyer: I offer to prove this, Your Honor, that although Warner Brothers purported to offer to the Viking Theatre an opportunity to license MR. ROBERTS, that offer was actually fictitious for this reason: they made that offer to the Viking on May 23; four days prior to that the Mastbaum Theatre, which is the theater that actually showed MR. ROBERTS, had signed a contract with Universal, i.e., on May 19, 1955, which contract says in it, right in its terms, that the Universal motion picture TO HELL AND BACK is to follow MR. ROBERTS; therefore, the Mastbaum knew on May 19 that they were to get MR. ROBERTS; otherwise, how could they put in their Universal license a commitment as to when they would play TO HELL AND BACK, that they would play it following the engagement of MR. ROBERT. And it was four days after this that Warner Brothers purported to offer Viking an opportunity to bid for MR. ROBERTS.

Mr. Goffman: May I answer that in two ways: First of all, I object to the offer of proof,

(6266)

but first let me state that the facts that Mr. Sawyer stated are not correct, because the license for MR. ROBERTS to the Mastbaum Theatre by Warner Brothers was long after.

Mr. Sawyer: You mean Universal.

Mr. Goffman: MR. ROBERTS by Warner Brothers. MR. ROBERTS.

Mr. Sawyer: Oh, the license of MR. ROBERTS.

Mr. Goffman: Was long after we invited the Viking to make an offer for it.

Therefore Warner Brothers was perfectly free to make that picture available to the Viking if its offer

was satisfactory, and the fact that there was a statement in the Universal contract of TO HELL AND BACK is something we had nothing to do with and could be explained, but I do not base it on a dispute of fact in an offer of proof, I base it entirely on the fact that for the picture MR. ROBERTS no offer of any kind was made by the Viking. This was well within the period when the Viking admitted that they had an opportunity to make offers for every Warner picture, and did elect to make the offer on some of them.

It is not a picture which within the rulings of this Court the Viking sought, made any offer for, or has any basis of contention in this case.

I therefore move that the offer be rejected.

(6267)

The Court: I will sustain the objection to your offer of proof.

Mr. Sawyer: No, Your Honor, I think this ought to come in. This really shows conspiracy it seems to me.

The Court: No, I disagree with you.

Mr. Sawyer: How would they know, Your Honor?

The Court: Well, here is Universal saying something.

Mr. Sawyer: Well, boy, they are all in one group. It certainly is a slip.

Here is the Mastbaum Theatre saying it. The Mastbaum got MR. ROBERTS. Look at this, Your Honor, here is a top grossing motion picture, a really big one. They get it. And four days before it is purported to be offered for the Viking the Mastbaum puts in its license for TO HELL AND BACK that the picture will follow MR. ROBERTS. How in the heck did they know they were going to get MR. ROBERTS?

Mr. Goffman: Do you know what the Viking Theatre played during the entire period that MR. ROBERTS was shown?

Mr. Sawyer: Sure, NOT AS A STRANGER. So what? That doesn't make any difference.

Mr. Goffman: They could not make an offer for

(6268)

for that picture.

Mr. Sawyer: Suppose we couldn't, that is not the point of this whatsoever.

Mr. Goffman: That is exactly my point. It is not in this case.

Mr. Sawyer: It is relevant in a conspiracy case to show that here they put this bid out, and they will make much of the fact that we didn't even attempt to get MR. ROBERTS, and the thing was settled, cut and dried, at the time it was put out. Now, that inference can be drawn.

How did the Mastbaum know, if this is an honest, up-and-up deal?

Mr. Goffman: It is not the inference. The question is, was Warner free to license it? Warner Brothers was free to license it to the Viking.

He made no offer. He had the opportunity. He got the letter. He declined to make an offer. That is the end of it.

Your Honor has ruled anyway.

Mr. Sawyer: It is not the end of it.

It is a highly significant piece of evidence, Your Honor, in terms of this conspiracy.

That is all I will say on the matter. I do not

(6269)

want to prolong these side-bar conferences with these offers of proof, but this one I certainly think, Your Honor, is highly significant.

Mr. Goffman. It doesn't show anything when this man did not submit an offer for the picture.

If he had submitted an offer and then it had been turned down because it was committed to somebody else, then he might have a point, but he submitted no offer, he wasn't interested in the picture. This is not within the scope of this case and Your Honor has ruled—

The Court: I think you are probably right, Mr. Goffman. If he had submitted an offer. Because at that time he would not know anything about the Universal.

Mr. Goffman: That is right, Your Honor.

The Court: So Viking had an opportunity to submit an offer. Then if it was turned down, why, the plaintiff would really have a grievance.

Mr. Goffman: That is right, Your Honor.

The Court: I adhere to my ruling.

Mr. Sawyer: All right, sir.

The Court: Do you have any other offers, Mr. Sawyer, while we are here?

Mr. Sawyer: I then want to go into the circumstances of the change of availability of the pictures,

(6270)

BATTLE CRY and EAST OF EDEN.

Mr. Goffman: Well, Your Honor has already ruled on both of those.

The Court: You wanted to go into the question of availability?

Mr. Sawyer: Yes, sir.

The Court: What do you mean by that, Mr. Sawyer?

Mr. Sawyer: Well, that BATTLE CRY, which is one of the three top grossing pictures during this time of Warner Brothers, first of all, on November 22, 1954, Warner Brothers advised Viking that the picture BATTLE CRY was being released in March, instead of the picture EAST OF EDEN. Then after that the availability was changed to February. That two days after the Viking was informed that BATTLE CRY was to be released in March Viking signed for a picture, in February, so that, therefore, they could not bid on the picture BATTLE CRY on its changed availability.

The application that was sent to Viking required that the picture open on February 9, but the earlier availability having been set down for March, the Viking had committed itself to a February picture. That actually the picture was awarded to the Randolph and that they didn't open it on February 9 anyway, they

(6271)

opened it on February 22.

That is one, and EAST OF EDEN follows right along. That is the offer on BATTLE CRY.

Mr. Goffman: Well, do you want to make your offer on EAST OF EDEN too? Or shall I comment on this one first?

The Court: Is it the same general idea?

Mr. Sawyer: Yes, sir.

The Court: EAST OF EDEN.

Mr. Sawyer: I want to put it on the record a little more specifically. Maybe I will and you can make your comment on both of them.

The Court: In other words, it is the same point involved.

Mr. Sawyer: Yes, sir, on another picture. A Warner picture, EAST OF EDEN. This is the fourth biggest Warner movie during the suit period.

It was discussed with the Viking, it was discussed with Mr. Comer in November, 1954, and with Mr. Wren in February of 1955.

On both occasions Mansell told the Viking people that the picture was available for the middle of March.

He met at the Bellevue with Mr. Wren respecting the motion picture, and at that time he did not offer it

(6272)

to Mr. Wren for April exhibition. Actually the motion picture played at the Randolph and it opened April 8, 1954, it having been, as I say, offered to the Viking only for March availability.

Mr. Goffman: Are you finished?

Mr. Sawyer: Just a second.

And that actually the advertising trailer, known as the "prevue" or coming attraction to us, Your Honor, for EAST OF EDEN started showing at the Randolph on February 20.

Mr. Goffman: 1955?

Mr. Sawyer: 1955.

So that although the date of the application of the Randolph for the picture is March 28, the picture must have been committed to the Randolph, since it showed it as a coming attraction as early as the 20th, if not sooner.

Mr. Goffman: Your Honor, I object to these offers of proof on these two pictures for many reasons.

I state first to Your Honor that this is another situation where no offer was made by the Viking. The Viking was, and admitted that it was, given an opportunity on both these pictures. It made no offer because, as this offer states—I do not concede the facts are accurate,

(6273)

but as this offer states it was then committed to other pictures and was not able to make a shift.

Our position is that having made no offer, just as in the case of the picture on which Your Honor last ruled, they cannot complain about the fact that there was or was not any change in availability.

If they had made the offer and the offer were rejected because of a change in availability, and they lost the picture for that reason, they might have a grievance. But they elected not to make an offer. Nothing can be deduced from the fact that there was or was not a change in play date or availability.

Now, Your Honor has ruled on this. If I may just get a note on my desk I will give you the page and the number where you ruled on this twice.

May I get it, Your Honor? And I will read it right into the record.

Mr. Sawyer: I think that I will agree. I don't think it was twice, but I will agree that on not the specific exact offer of proof of this witness, but on the pictures EAST OF EDEN and BATTLE CRY, Your Honor for purposes similar to this did rule them out.

This is the first time Your Honor has had available, however, the specific facts.

(6274)

And may I just say one more word, because I do not want to prolong these offers, but to say, Your

Honor, that we didn't bid on it, when our contention is that by a deliberate subterfuge of Warner Brothers, they come to us and offer us the pictures. They sit down at the Bellevue here and they say: We can't give you this, this picture isn't available in April, if you want this picture it has to be in March. We say, we can't take it in March. What happens? The picture plays in the Randolph opening in April, when we were told it was not available to us. Then they reproach us for not bidding on it.

Mr. Goffman: We do not reproach you.

Mr. Sawyer: I do not mean you reproach us, but to use that as a reason why we can't introduce this evidence, it seems to me is the tail wagging the dog.

Mr. Goffman: Your Honor, I do not want to reargue the things we have argued.

The Court: Tell me this, Mr. Goffman.

Mr. Goffman: Yes, sir.

The Court: If they did not make an offer because of the availability date that would be a reason why they did not make an offer.

Mr. Sawyer: That is right.

(6275)

Mr. Goffman: Just as they did not make offers on other pictures because they were picked up or for any other reason.

The Court: But if the date is changed how does that affect the situation?

Mr. Goffman: Your Honor, if they have made it even for the original date, and say you have no right to change it, and we have rejected it, I would say that bears some consideration. But here they made no offer.

Nobody knows what terms they would have offered, nobody knows whether they had playing time, nobody knows whether they would have been good or bad.

There is no basis to go forward from that, Your Honor.

This is a case where the picture was presented to them. They could have offered on the original availability.

Let us assume that we changed it. Let us assume that. I do not concede that, but let us assume it. Then they come here and say, Your Honor: We made a good offer; they didn't accept it; and they changed the availability, so we couldn't get it.

But they didn't do that. They didn't proceed for the picture, and that is what this case is about, on pictures they proceeded for.

Your honor has ruled that on a number of occasions,

(6276)

including these two pictures. You did it the day before yesterday, and you did it on your general 9 point ruling, when this situation was specifically covered in Points 8 and 9.

Mr. Sawyer: That is right, Your Honor. I think Point 8 and 9 would cover this.

The Court: You are very fair, Mr. Sawyer.

I will adhere to my ruling. I will sustain the objection to the offer of proof.

Mr. Sawyer: My purpose in coming up here each time is not to reargue this.

The Court: I appreciate your frankness, Mr. Sawyer.

Mr. Sawyer: With all due respect, I think this is an erroneous ruling.

Now I have to go a little further, but I realize there is no use wrangling around with the witness. Don't you agree, Your Honor, that I should do it this way?

The Court: All right.

Mr. Sawyer: Also with respect to EAST OF EDEN and BATTLE CRY I offer to show that they were both on the Goldman side of the split. I offer to show that on the exhibition of EAST OF EDEN at the Randolph Theatre the Randolph Theatre grossed $60,000 above and beyond

(6277)

film rental and that, nevertheless, on June 3, 1955, Warner reduced the film rental to the Randolph Theatre from the contractual obligation of 50 per cent the first week to 45 per cent.

I offer that too.

Mr. Goffman: That is objected to.

Mr. Sawyer: I assume Your Honor sustains the objection to it.

The Court: I sustain the objection to your offer of proof.

Mr. Goffman: Frankly, Your Honor, I do not know whether those facts are accurate or not.

The Court: I have to assume they are accurate—

Mr. Sawyer: They are from my records, Your Honor.

Mr. Goffman: But I do not accept them.

The Court: —because I am ruling out the proof on that.

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(6278)

By Mr. Sawyer:

Q. Mr. Mansell, do you recall a motion picture GIANT?

A. Yes, sir.

Q. That was the biggest grossing Warner picture of all time, wasn't it?

A. I believe it was, yes, sir.

Q. Do you recall that the Viking bid on the picture GIANT?

A. Do I recall?

Q. Do you recall that the Viking bid on the motion picture GIANT?

A. Oh, yes, I recall.

Q. I show you P-53. Is that the Viking bid?

(6279)

A. Yes, sir.

Q. And the Mastbaum Theatre also bid, did it not?

A. Yes, sir.

Q. (Handing document to witness.)

Where did the picture play, sir?

Mr. Goffman: Does that have a number, Mr. Sawyer?

Mr. Sawyer: Yes. I am sorry. This is P-51.

By Mr. Sawyer:

Q. The Mastbaum also bid, did it not?

A. Yes, sir.

Q. And where did the picture play?

A. In the Mastbaum.

Q. Have you had a chance to glance at those two bids?

A. Yes, sir.

Q. Did the Viking offer a guarantee?

A. Yes.

Q. How much was it?

A. $65,000.

Do you consider that to be a substantial guarantee
Philadelphia?
It is a substantial guarantee. It could be better in
ier theatre, you know, higher.
n your experience that is a substantial guarantee

Philadelphia, is it not, sir?
Yes. I reiterate, it is a substantial guarantee.
Yes. Did the Mastbaum offer any guarantee?

Mr. Goffman: That is objected to, Your Honor.
speaks for itself. Picking one term out of it alone
erely not demonstrating anything. Both of them
been offered in evidence. They will both speak for
iselves.

Mr. Sawyer: Well, we will pick out all the terms,
Goffman.

The Court: Overruled.

Sawyer:
Did the Mastbaum offer any guarantee, Mr. Man-

No, sir.
s there a provision in there with respect to play-
?
Which contract, sir?
That is right. Is there a provision in the Mastbaum
respect to playing time?
Yes, sir.
And what is that playing time offered?
Minimum of six weeks.
s there a provision in the Viking bid with respect to
ime?

Yes, sir.

Q. What is that provision?

A. A minimum of ten weeks.

Q. Would you generally consider that the commitment for a minimum of ten weeks is superior to a commitment for a minimum of six weeks?

A. Not in the Mastbaum Theatre—not the Viking against the Mastbaum Theatre.

• • •

(6282)

Q. Now, just with respect to the commitment for playing time, wouldn't you agree, Mr. Mansell, that an exhibitor who commits himself to playing one of their pictures for ten weeks is in that respect offering better terms to Warner Brothers than one who commits himself to playing for only six weeks?

A. No, sir.

Q. You would not agree to that?

A. No, sir.

Q. Now, is there a special proviso in the Mastbaum bid with respect to the length of time which Warner Brothers has in which they must accept that bid?

A. I don't understand your question.

Q. Well, I will invite your attention to a particular clause, and without characterizing it, I will ask you if you will read it.

A. In the Mastbaum?

Q. In the Mastbaum bid, (indicating).

Now, in this bid, sir, where it says "Clearance," would you read that typed-in portion.

A. Oh, yes.

"We reserve the right to withdraw this offer unless a reply is received by us October 16, 1956."

(6283)

Q. This is the Mastbaum bid you are reading now, sir, is that right?

A. Right, sir.

Q. What date was this bid that you are reading from submitted?

A. By whom and to whom?

Q. By the Mastbaum to you.

A. Oh, that is different.

The 9th of October.

Q. So the Mastbaum gave Warner Brothers seven days in which to accept or reject this bid, is that correct, sir?

A. Yes, sir.

• • •

Q. Did you consider, Mr. Mansell, that that was an unreasonable proviso for an exhibitor to make in submitting a bid?

A. No. It is rather a usual one. The Viking has it in

(6284)

every bid they submit to us.

Q. Do they?

A. They give us three days to approve a deal.

Q. You point that out to me, will you, in the Viking bid, sir.

A. Well, it may not be in this one but it is not uncommon for them. Wait until I look.

Q. Now, could you tell me any—

A. Just a minute, sir.

Q. Oh, yes, take your time. I am sorry.

A. The Viking did not—oh, wait a minute—the Viking did not have any stipulation as to when they would—as to the amount of time they would give me to approve the contract.

It is in all the contracts; they can withdraw them in seven days if they so desire.

Q. Well, we will come to where the Viking did it in others, but you think that seven days is a reasonable length of time in which an exhibitor should expect to have his bid pending for consideration?

A. Yes.

• • •

(6296)

Q. Now, Mr. Mansell, if I tell you this, that during the last full week of the engagement that GIANT grossed at the Mastbaum, GIANT grossed $15,736, I ask you, isn't that a good gross for a sixth week of an engagement, seventh week of an engagement?

A. Yes. That is a good gross.

Q. It sure is; and that is particularly good pre-Christmas week, is it not?

A. I don't recall the date that it came off—you know, the date of the seventh week. I don't remember that.

Q. And isn't it—well, it—that gross included Christmas Day and the 26th and the 27th?

A. Well, then that was the full—full week there.

Q. Right.

A. Yes.

Q. The full week.

A. Yes.

Q. And then the picture played one remaining day, sir, on the 28th.

A. Yes, sir.

• • •

(6297)

Q. The question was this, Mr. Mansell,—

A. Yes.

Q. —why, if the motion picture GIANT, which we have agreed is your biggest motion picture during this period—in fact,

(6298)

of all time, Warner Brothers picture—$12,000,000 it did nationally in film rental for you;—

A. It did.

Q. —right?

A. Yes.

Q. Now, why, if this picture in the last full week of its engagement, sir, that week ending on the 27th of December, earned, grossed $15,700, it was removed and taken off?

Mr. Goffman: Your Honor, very respectfuly, I would like to urge another objection which I didn't make before, and that is this: It has absolutely nothing to do with the award of this picture. The bids were compared when they were made. What happened during the performance doesn't affect the Viking bid either one way or the other. I think we are getting into a field that is really beyond the scope of the controversy.

Now, I think what Mr. Sawyer is trying to do is to answer some other problem that has been raised with some other picture by some other company, has nothing to do with this defendant, or any testimony that will come from this defendant.

I therefore respectfully make this objection on another ground, that as to when the run was terminated of this picture, even though it is beyond the period, has nothing

(6299)

to do with the issues in this case.

The Court: Objection overruled.

The Witness: Shall I answer?

By Mr. Sawyer:

Q. Yes, sir. Could you, please, sir?

A. Can I get the last couple of sentences in that question?

The Court: If you know.

Mr. Sawyer: Yes, sir.

The Court: If you know.

The Witness: Do I know? Oh, if I know why the picture was taken off?

The Court: Yes.

The Witness: Oh, I don't know exactly, other than the—the exhibitor, meaning the Mastbaum, had another picture and they put it in there on the 27th, 28th,—

Mr. Sawyer: Very well.

The Witness: —primarily to get the holiday, new holiday, new picture, new holiday.

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(6318)

Q. Did you ever try to sell any pictures to the Fox Theatre?

• • •

(6319)

A. No, sir.

• • •

Q. Why not, sir?

A. Well, the Fox Theatre at no time ever evidenced any interest in my pictures.

Q. Well, wasn't it because they—you knew they were playing exclusively Twentieth Century-Fox products?

A. Not necessarily. I knew they were playing Twentieth Century-Fox, but once in a while they got other pictures, but they never were interested in mine.

Q. Well, you were in the business of selling motion-picture films, were you not?

A. Yes, sir.

(6320)

Q. To theatres?

A. Yes, sir.

Q. And as, I suppose, most salesmen, you wanted to go around and interest as many people as possible in your product?

A. Well, you couldn't interest too—too many people downtown. You only had one person to interest, one theatre. You only made—

Q. Well—

A. —sell one run in center city.

Q. I understand that, but wasn't it to your interest, of Warner Brothers, to have as many potential customers as possible?

A. Well, I come right back and say to you, Mr. Sawyer, that the Fox Theatre wasn't interested in my product.

Q. All right; they were—that is a fair statement—they weren't interested, and the answer is that you didn't attempt to interest them, did you?

A. Now, wait. Don't—don't answer me the question. I will answer it.

Q. Well, did you make any attempt to interest them in your product?

A. No, sir. I did not.

Q. And was that because you knew it was useless because they had all the Fox product?

(6321)

A. They—they didn't show any evidence of interest in the pictures, and they didn't bother them.

• • •

(6324)

Q. I will repeat it. Did you ever reject offers of the Viking and then negotiate with Goldman or Stanley Warner?

A. Why, we negotiated with all—all of them, every—everybody in first run.

Q. Well, all right. Now, just a moment. Were there not occasions, Mr. Mansell—and we referred to this series of bids, remember, that I showed you at the Viking?

A. Yes.

Q. All right. Now, were there not occasions where those bids were rejected and then you sat down with Goldman and negotiated the picture to the Goldman theatres?

A. Oh, the picture—yes; it is possible. I did it with everybody else in the first-run situation—

Q. You did it with—

A. —including the Viking Theatre. We would call Mr. Wren on the phone and offer him the picture and we would get the answer back, "No change in the bid."

Q. Very well.

A. Bang. That means the telephone going up.

Q. But, of course, this is not the Fox?

A. This is what?

Q. Not the Fox?

• • •

(6325)

Q. Now, when you went to negotiate—and did you also sit down and negotiate with Mr. Goldman after bids were rejected?

A. Well, most of the time, yes.

Q. And during that—

A. Negotiate with all of them, not only Mr. Goldman.

Q. And—

A. Anybody that evidenced any interest in the product, I sat down and negotiated with them.

Q. And when did you ever sit down and negotiate with the Viking?

A. I think there was one occasion where I actually sat down.

Q. And that was the BAD SEED, was it not?

A. Yes, sir. Mr.—

Q. Yes; and that was the only—

A. —Mr. Wren and Mr. Sley both came into my office, but all the other times when I had rejections it was that telephone job, and it was terrible.

Q. And was there a record made of those telephone calls? By the way, they didn't get the BAD SEED, did

they? They didn't get the BAD SEED, did they, the Viking?

A. No, sir.

• • •

(6326)

Q. Now, when you did sit down and negotiate with Goldman or Stanley Warner, would you tell them who had made rejected offers.

A. No, no. I just went in there and tell them, "Here, I am ready to negotiate for the picture."

Q. Never did that? You didn't tell them that so and so has

(6327)

made an offer and they have been rejected—

A. No.

Q. —and somebody else—

A. No, because that leads to other conversations. It isn't good.

Q. Because if you did that then the question comes up as to what those offers might be?

A. That is right, sir—and I stayed away from it.

Q. You wouldn't tell Goldman, for instance, what you wanted for the picture, how much you expected to get for it?

A. Oh, yes.

Q. Well, you would tell him that?

A. Yes, sometimes—not all the time, no.

Q. But you would never tell him who—

A. If I didn't have any bid from—from any of the other theatres, I might tell Goldman or Stanley Warner.

Q. And you—but you wouldn't tell them who it was that had—whose bid had been rejected?

A. No.

Q. Now, I read to you, Mr. Mansell, page 104 of your deposition.

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(6328)

Q "Q. Well, I suppose you reject offers at the Viking and the Arcadia and then went to negotiate a deal w th the Goldman Company. In negotiating with the Goldman Company, wouldn't you tell them what unsatisfactory offers you had had and try to get them to do better than that?

"A. No, just general conversation. They would gather from me that the offer that was made was not satisfactory.

"Q. Would you say who had made the unsatisfactory offers?

"A. Sometimes, yes."

So we will read it all:

"Q. How would you start negotiating in terms with them? Would you tell them what you wanted for the picture?

"A. Yes.

"Q. And when you would tell them what you wanted after you had rejected offers, you would naturally start with something you considered better than the rejected

(6329)

offers; isn't that true?

"A. Yes."

• • •

Q. Didn't, Mr. Mansell, didn't you decide that in licensing Warner pictures that you would stick to the Stanley Warner and Goldman because you knew them as established customers?

A. I believe I made that statement at one time. I did stick to anybody else that was interested in the pictures, too,—

Q. And—

A. —that would show some evidence of buying them.

• • •

(6331)

Q. Well, you were speaking of the fact that you would stick with any established customer, is that right, Mr. Mansell?

A. Yes, sir. Well, I answered that.

Q. All right. Then I asked you whether or not the Viking was ever awarded—I will change that. What picture if any was the Viking awarded, a Warner Brothers picture, during this whole period?

A. They were awarded one picture, BABY DOLL.

Q. And when were they awarded that picture?

A. November, but I don't know the exact date.

Q. November, 1956—

A. Yes, sir.

Q. —was it not? Just at the end of this period?

A. Yes.

• • •

(6332)

Q. Isn't it true, Mr. Mansell, that you told us that this split arrangement was entered into in the fall of 1953?

A. Right, sir.

Q. All right. And thereafter, and immediately, didn't Mr. Goldman's theaters commence to play Warner product?

• • •

The Witness: Yes, sir.

(6333)

By Mr. Sawyer:

Q. And were they prior to that an established customer of Warner Brothers?

Mr. Goffman: Objected to, Your Honor.

There is no question here about whether an established customer like the Viking was denied anything. He hasn't said that he would not give him any pictures.

The Court: Well, prior to 1953 the question is whether they had become an established customer.

Mr. Goffman: That is before our suit period, Your Honor. You have ruled that out many times.

The Court: I will sustain that objection.

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(6343)

THIRTY-SIXTH DAY

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(6354)

By Mr. Sawyer:

Q. Mr. Mansell, do you recall that the Viking bid on the motion picture TOWARD THE UNKNOWN?

A. Yes.

Q. It did?

A. Yes.

Q. Do you recall that there was also a letter bid from the

(6355)

Goldman on the motion picture for the Goldman Theatre?

A. Yes, sir.

Q. To whom did you award it?

A. We awarded it to the Goldman Theatre.

Q. Why did you award it to the Goldman Theatre?

A. Well, in my business judgment I felt that it was the better theatre in which to play the picture, and that it would produce more film rental for Warner Brothers than if it played the Viking.

Q. Was that on the basis of history, in terms of grosses, or was it on the basis of that partcicular bid? What was the standard that you used in making that decision?

A. Well, I applied my usual business judgment and experience to both bids and I awarded it to the Goldman.

Q. Could you tell us as a result of the application of that business judgment what factor it was or what factors there were that led you to make that determination?

A. Well, the Goldman Theatre in my opinion outgrosses the Viking Theatre. It is a better grossing theatre.

Q. You were not speaking of its performance on Warner Brothers product, were you?

A. That is all I know, Mr. Sawyer, Warner Brothers product. I don't bother with anybody else's merchandise.

Q. So that is what you were comparing it with, the perform-

(6356)

ance on Warner products?

A. Oh, yes, sir.

Q. But at that time Viking had never had a Warner picture, had it?

A. No, no, it had not.

Q. In fact, it never got one, so there was no performance on Warner product during the period of the suit because none—

A. None—oh, excuse me.

Q. —of it actually played there during that period; isn't that correct?

A. They never played any during that period. They just had the one picture licensed to them that they hadn't shown yet.

Q. Well, at this time how could you be comparing then the performance, when you say that was the only product of Warner's between the Goldman Theatre and the Viking?

A. Well, through my experience I knew that the Goldman Theatre was outgrossing the Viking Theatre, so I just applied that yardstick and gave it to the Goldman.

Q. I thought you said a moment ago that the only thing you knew and the only thing you considered was on Warner product?

A. That is true.

Q. Well, the Viking didn't have any Warner product, did they, sir?

A. They didn't have any Warner product, but they were playing

(6356a)

pictures, and from my knowledge of what they were grossing, around, I had to naturally use something as a barometer, you might say, to apply it to my pictures.

(6357)

Q. You didn't use Warner product, did you, Mr. Mansell, to make that balance? You didn't use Warner product, did you?

A. Well, I didn't have any to play.

Q. Didn't have any, did they? So your testimony then is that it was on other product that you considered that they were outgrossing the Viking?

A. Yes, sir.

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(6383)

Q. Well, how do you decide whether you are going to give a man an adjustment or not?

A. Well, sometimes a precedent might have something to do with it, which the exhibitor forces on you all the time. He comes in and he will say, "I only grosed X number of dollars on this picture this week, and you only charged me X percentage," and he tries to beat you down to that X percentage again for the picture that he is complaining about.

Q. Well, grosses vary. Grosses on motion pictures vary very, very widely, do they not? Grosses vary?

A. Grosses on pictures?

Q. Yes.

A. Oh, sure; sure. You got—

Q. Depending on—

A. You got evidence of it right here.

vell.
ot a—you are—you are giving me a FLAN-
here for three weeks and DRAGNET here in
nan. Well, this DRAGNET would—would—
l FLANNEL GRAY SUIT around the coun-
ler hamlets. It was in the big cities where the
NEL did the business and not the DRAG-
is the same with this.
hen you try to make this decision on adjust-
s that the picture did got to be compared with
nses the exhibitor has, doesn't it?
on't get into the expenses when I am making
. I told you a minute ago, it is—it is more
ecedent that the exhibitor is on your back all
is asking for—naturally, that is his business,
a rental down as low as he can, although he—
any reductions in the Philadelphia Electric
ome of those other utilities, but he wants us
oad.
uring the course of the year a picture—a
a picture, you know, and he did, as I said—
o repeat it; it is the same story—he did so
, and you charge him so much percentage—
ght back again and he wants the same per-
l to—to the picture that he is talking about.

f course, the Viking had bid on this motion

es.
ou—do you consider that relevant as to
the exhibitor who got it should have an ad-

hen the—when the Viking bid on this pic-
o bear in mind that this was a picture that I

was aiming for a Labor Day release and the Viking couldn't give me a Labor Day release. In fact, he bid on the picture and it said, "On or about availability." Shall I go on? It was on or about availability, and—and at the time they were playing a picture that had a, you know, pretty good commitment, maybe 8 or 10 weeks, and it was going to go right over Labor Day, and I was pitching for Labor Day around the territory, around first-run Philadelphia.

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(6386)

Q. The Viking submitted a written bid on this picture, didn't it?

A. On which picture?

Q. Oh, McCONNELL STORY.

A. Oh, yes; yes.

Q. All right; and was that bid rejected?

(6387)

A. Yes, sir.

Q. And did you negotiate the picture to the Randolph?

A. That is right.

Q. Now, when it came time to make—when the Randolph came around and asked you for an adjustment—they did that, did they not, on the picture, they asked you for an adjustment, the Randolph?

A. Oh, they—they made a request; yes.

Q. And you granted them an adjustment, did you not?

A. Yes. I reduced the terms on the picture—

Q. All right.

A. —the same as I would have done for the Viking or anybody else—

Q. You are just taking time.

A. —if they were playing the picture.

• • •

(6388)

Q. In deciding, Mr. Mansell, whether or not to grant an adjustment to the Randolph Theatre in this situation, did you think that it made any difference that this was a picture on which another theatre had submitted a written bid?

A. I took it into consideration before I made the—the adjustment. I knew—I was aware of the fact that the Viking had made the bid, but I still figured that the Viking couldn't come in with a—give me a play date, namely, Labor Day, which is a holiday, and all distributors are after holidays. I knew he couldn't give it to me and the contract was rejected. So, therefore, I went into the Randolph and sold it to him. He gave me—and I got the holiday.

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(6389)

Q. First of all, Mr. Mansell, is it not—here is the Viking bid, and do they not here offer you availability, that they will play the picture on availability which you advised

(6390)

them?

A. Approximately on availability.

Q. And it says, "which we have." Will you read the rest of that?

A. Approximately on availability which we have been advised is on or about August the 25th. That is in the Viking letter.

Q. All right. Now, as far as that availability goes and that playing time, if the Viking had been able to do what they there said, you would have no objection to that, would you? That is when you wanted to play the picture; right?

A. I wanted to play it on availability in order to meet the holiday; yes, sir.

Q. And was that the availability to what the Viking offered you there?

A. Well, it isn't as simple as all that.

Mr. Goffman: If Your Honor please—

The Witness: This happens to be one picture that I called Mr. Wren about and asked about his ability to meet the—to meet the—if I, you know, before I evaluate the—the bids, would he be able to meet the Labor Day, and he told me at the time he didn't think he would be able to meet it on account of this previous commitment.

(6391)

Q. The Randolph, didn't they have a previous commitment also, to play another picture for eight weeks?

• • •

The Witness: Yes, yes, they did.

By Mr. Sawyer:

Q. What was that picture?

A. They had a—I don't remember.

Q. SUMMERTIME, was it not?

A. I don't remember the title.

Q. SUMMERTIME?

A. SUMMERTIME, I think that was it, yes.

Now, they had a commitment also, but the first

(6392)

thing I did was to reject the bid in the Viking, then I was at liberty to go around first-run Philadelphia and see where I could get in Labor Day.

I may have had to gone back to the Viking Theatre and sold him the picture if I didn't pick up the holiday date in the Randolph.

Q. Well, first of all, let me get this straight: You weren't at liberty to go to Stanley, were you, because of the split?

A. I was at liberty to go anywhere in first-run Philadelphia.

Q. Well, the split required—

A. I didn't know—I didn't know from nothing about the split.

Q. I don't—

A. I just went and sold the pictures to whomever I could sell them.

Q. You didn't know anything about the split, Mr. Mansell?

A. Well, that is a--what would you call it?

Q. A figure of speech?

A. A figure of speech, yes.

Q. And when you had these motion pictures for sale, you were informed, were you not, as to on whose side of the split they fell?

A. Yes.

(6393)

Q. And you went to negotiate or to sell them to that exhibitor?

A. Yes, sir, if either one of them gave me any trouble I would go to the other one.

Q. You would?

A. Yes, I would have to sell the pictures.

Q. Well, that was not what you testified to Friday, was it?

A. Oh, yes.

Q. Well, didn't you testify—

A. I testified Friday that our pictures were open for competition—you know, competitive negotiations are for everybody.

Q. And didn't you testify Friday that when you went to negotiate you weren't ever in a position to tell one of the people on whose side it fell that if they didn't meet terms it would go over to the other side of the split; you said you didn't do that, didn't you, on Friday?

A. No, I didn't testify that, no.

Q. Well, are you testifying now that the pictures, if they fell on Mr. Goldman's or Stanley's side of the split

you went to both Stanley and Goldman to sell those pictures?

A. No, sir. No, I did not say that. I said to you that if I couldn't sell Stanley I wouldn't hesitate to go to Goldman and offer him the picture. I wouldn't hesitate to go

(6394)

and offer it to Mr. Wren.

Q. And what picture did you ever fail to sell to the person on whose side of the split it fell, and then sell it to the person on the other side of the split; can you name me that picture, if any?

Mr. Goffman: That is objected to, Your Honor.

It doesn't matter whether there was an example or not. It doesn't matter particularly if it was not a picture that the Viking Theatre was interested in. He has stated he handled the selling of pictures downtown Philadelphia.

I object to the question.

The Court: Overruled.

By Mr. Sawyer:

Q. Can you name me any such motion picture, Mr. Mansell? Can you name me any such motion picture?

A. No, I don't recall any at the moment.

I have always been fortunate in being able to make a deal. I can negotiate with anybody.

Q. It just worked out that way, didn't it, Mr. Mansell, that the person on whose side of the split it fell you were able to make a deal with?

A. But it didn't always work out easily. There were a lot of negotiations encountered with everybody.

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(6395)

Q. Now, Mr. Mansell, we are still on the motion picture McCONNELL STORY.

A. Yes.

Q. (continuing) And the Viking's availability given to you of August 25, and then you said that you ascertained that the Viking had a commitment that would prevent them from playing the picture over Labor Day; is that correct?

A. That is correct, sir.

• • •

(6396)

Q. Did you find out that the Randolph likewise had a commitment that would prevent them from playing the picture over Labor Day?

A. As I stated before, when the bid was rejected in the Viking I went around and found out that the Randolph had a commitment and I was at liberty to take that picture any place I wanted to first-run Philadelphia to see where I could get a deal and include the holiday, and that I testified to previously.

Q. But you found out that the Randolph did have a commitment, did you not?

A. At the time, yes, sir.

(6397)

Q. Oh, very well.

A. Yes.

The Court: Then, how did the Randolph play it Labor Day?

The Witness: Well, the picture that they had, Your Honor, call-d—

Mr. Sawyer: SUMMERTIME.

The Witness: —SUMMERTIME, they had a commitment on it that took them over Labor Day, but it was, as we say in the business, going on its face, it wasn't doing any business, and, consequently, they wanted to take the picture off. And by so doing it opened up the holiday, and then I stepped in an sold

them the McCONNELL STORY to include the holiday play date.

By Mr. Sawyer:

Q. That is what I wanted to come to; did the Randolph tell you that in spite of their contractural commitment to United Artists on SUMMERTIME?

Mr. Goffman: That is objected to. He had no relationship with what their contractural commitment was with United Artists. He told him how he made the deal.

The Court: No. I think that is right. He said that they had a commitment for some other picture, and that when he negotiated with Goldman for the Randolph Theatre the

(6398)

picture wasn't doing so well and so, therefore, Goldman took it off. Now, how he took it off, whether with or without the consent of United Artists, it is immaterial so far as this witness is concerned.

Mr. Sawyer: What I want to know is whether the Randolph told him that that is what they would do.

By Mr. Sawyer:

Q. Did they tell you they would take SUMMERTIME off in spite of their contractual commitment?

Mr. Rome: That has been objected to and I—

The Court: Sustained.

Did they tell you they would take SUMMERTIME off?

The Witness: Your Honor, no, it worked out this way, they called and told me that this picture SUMMERTIME was doing poorly and they were going to try to get off—get out, and they did, and they would

take my picture on to open on the 30th of August, I think it was.

The Court: Very well.

Mr. Sawyer: All right.

The Witness: I wasn't interested in any of their negotiations with United Artists, but I wanted to get the picture in.

The Court: Very well.

(6399)

By Mr. Sawyer:

Q. Then did they subsequently inform you that they were going to take it off and that they would sign it up for McCONNELL STORY?

A. Mr. Sawyer, they told me that they were having trouble with SUMMERTIME grosswise and that they were going to try to get out—you know, get the playing time reduced, the next thing I knew they offered me August 30th opening and I negotiated and made a deal with them.

Q. All right.

A. Now, what they did with United Artists I don't know and I don't care. I am only interested in Warner Brothers business.

Q. When did you make the deal with them?

A. It was sometime in August, probably the middle of August or a little later, I am not sure.

Q. Did you sign a contract for the picture the McCONNELL STORY; did you enter into a contract with them at the time you made the deal?

A. Yes, I entered into a contract, but it wasn't signed at the time, no sir, because at that time I was traveling from Indianapolis east, and a lot of times I would make deals with a lot of exhibitors, write it on a piece of paper, and sometimes it was made out by the girl right away and sometimes it wasn't. That is what happened there.

(6400)

Q. Well,—

A. We had a deal; bear in mind, when they called me and told me they had August 30th, I made the deal right there and then with them for the picture, but I didn't sign the contract. You don't sign a contract the day—

Q. I know you didn't sign it, Mr. Mansell, if you were traveling. Did they sign it on their side of the contract and send it to you then, when they made this deal with you on August 31st?

A. They signed the contract when I sent it over to them for signature, yes, sir.

Q. You sent it over to them later, did you?

A. Later than what, sir?

Q. The contract wasn't signed until September 7, was it?

A. That is right, that is right, that happens frequently.

Q. And the motion picture—

A. But I have a deal, a deal with a lot of exhibitors, and they don't get around to signing the contracts until the engagement is started. Sometimes they are finished before you get around to signing them.

Q. By the way, what was the bid due date on this picture McCONNELL STORY, do you recall that?

A. I don't recall that. If you show me the bid I can tell you.

(6401)

Q. Well, not the bid, but isn't this the letter from Warner Brothers advising the Viking that the bid due date was back on July 15?

A. Yes, yes.

Q. Well, it says it, doesn't it?

A. I beg your pardon?

Q. Isn't that what it says?

A. I said that.

Q. Yes.

A. Yes, July 15, that they were to get word back to us whether or not they were interested in the picture.

Q. That is what is known as the bid due date, is it not?

A. Yes, sir.

Q. In the trade?

A. Yes.

Q. Were you ever asked to make an adjustment for the Viking?

A. No, sir, they didn't play enough pictures to get into that position with us. They only played a couple.

Q. Well, the only one during this period was BABY DOLL, was it not?

A. They didn't play it during the period.

Q. But it was licensed to them?

A. It was licensed to them, yes, sir.

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(6404)

Q. In the picture SERENADE, Mr. Mansell, do you recall that picture, that was a Warner picture, was it not?

A. Yes.

Q. Do you recall whether or not at the time of the screening of SERENADE, which I tell you was March 2, 1956, that you advised Mr. Wren and Mr. Sley that the picture would be available for April 21, 1956?

A. Is that the question?

Q. Yes.

A. Yes, I recall that.

Q. And do you recall the Viking bid on the motion picture?

A. I don't recall the details.

Q. We won't read this unless you want to, but just identify it. This is P-43. Does that appear to you to be the Viking bid on the picture SERENADE?

A. Yes, sir.

(6405)

Q. First of all, SERENADE was assigned to Goldman on the split back in the previous November, was it not?

Mr. Goffman: If he knows.

The Witness: Back in November? I don't know.

By Mr. Sawyer:

Q. Do you recall, Mr. Mansell?

A. I said I don't recall.

(Counsel confer.)

Mr. Goffman: What is that, P-1?

Mr. Sawyer: It is P-1. The exegesis of P-1.

Mr. Goffman: Of course, that is not this witness' exhibit.

By Mr. Sawyer:

Q. Let me show to you, Mr. Mansell, that this is a document, the accuracy of which has been agreed to between counsel; it represents excerpts from a record of Stanley Warner Company.

A. Yes.

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(6406)

Q. I will ask you, with respect to the time on which SERENADE was put on the Goldman split, does that refresh your recollection, that document?

Does that document refresh your recollection as to when the picture SERENADE was put on the Goldman split?

A. No, it wouldn't refresh my memory.

Q. It doesn't?

A. No.

Q. Now, the Viking bid—this is SERENADE again—was rejected the following day, was it not?

A. Well, I don't know, I haven't the records with me.

Q. What is the date of that bid, Mr. Mansell?

A. March 5.

Q. And then is this a letter from Warner Brothers to the Viking dated March 6?

A. Yes, sir.

Q. What does that letter say?

A. "Please be advised that your offer for a license to exhibit the picture SERENADE at the Viking Theatre, Philadelphia, has not been accepted."

Q. And then was the picture negotiated with the Goldman Theatre?

A. Yes, sir.

(6407)

Q. And did it open at that theater on the availability of April 21 that you gave to Mr. Wren and Mr. Sley?

A. No. That picture opened April 9, I think it was, or the 8th.

Q. March 31, wasn't it?

A. Well, yes, March 31, you are right, it opened on March 31, which was unusual in this case because what we had done—

Q. There is no question.

The Court: No. He can answer. Go ahead.

The Witness: What we had done there was we negotiated for the picture with the Goldman Theatre to open on April 21 and in the interim, why, something went wrong I guess with his bookings and it developed that he had Easter Sunday open. So he called me up to see if I could get the print. Sometimes we do that, we move the pictures up in their availability if we can get the prints in from the Coast. I contacted my home office and they told me they could get me a print and we moved it up there to March 31 play date.

By Mr. Sawyer:

Q. And in the interim you didn't inform the Viking that the availability was being changed by three weeks?

Mr. Goffman: This is objected to.

The Witness: It wasn't necesary to notify the Viking. He had bid and—

(6408)

By Mr. Sawyer:

Q. It was rejected?

A. And the bid was rejected, and we moved the picture up. The Goldman made a request to move it up so we got the print.

Q. By that time it had been licensed to the Goldman Theatre, had it not?

A. I beg your pardon?

Q. By that time it had already been licensed to the Goldman Theatre?

A. This all happened after the license was completed with the Goldman Theatre. We sold it to the Goldman Theatre to open on April 21.

Q. That was a contractual relationship—excuse me. The contract itself provided April 21, did it, with the Goldman?

A. Well, there wasn't any provisions in the contract. We never put play dates in the contract. But when it was sold to the Goldman Theatre, it was with the idea that it was to open April 21.

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CROSS-EXAMINATION

By Mr. Goffman:

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(6411)

Q. Mr. Sawyer showed you a letter last week and read to you a few sentences about the Viking Theatre. Do you recall that?

A. Well, that wasn't a letter from—that was a letter from the lawyer, it wasn't from the Viking Theatre.

Q. When did your company first hear from the Viking Theatre that it was interested in Warner Brothers pictures first run in Philadelphia?

A. In October of 1954, October 25.

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(6412)

Q. Is this is the letter you have referred to, Mr. Mansell?

A. Yes, sir.

Q. Would you read to his Honor and the members of the jury that letter, its date, leaving out I think the third paragraph which refers to another matter.

A. Well, it was written on October 25, 1954, to Mr. Charles Beilan, Warner Brothers Pictures, 230 North 13th Street.

"Dear Mr. Beilan:

> We are interested in making offers for your product for first-run exhibition in Philadelphia at the Viking Theatre. Will you kindly inform me of your coming product availability and screenings."

Then the other paragraph refers to the Locust Theatre.

"Send all mail to my attention at the Viking Theatre."

Q. And who signed it?

A. Herman Comer.

Q. Who is Herman Comer?

(6413)

A. Well, at that time he was the manager and the buyer, booker I assume for the Viking Theatre.

• • •

Q. You testified last week that you visited the Viking Theatre and offered them some pictures in November of 1954. Was that in response to this letter that you have just read?

A. Oh, yes, yes. Upon receipt of the letter, within a couple of, maybe a week or so I had gone over and saw Mr. Comer.

Q. Now, prior to the receipt of this letter in October, 1954, what efforts did the management of the Viking Theatre make to secure your product first run Philadelphia?

A. They didn't make any efforts. They had opened in July and they were playing Metro product right down one week after the other. They weren't interested in my pictures.

• • •

Q. Now, what relationship does the granting or refusal of that adjustment or any other adjustment that you may give to any exhibitor have on the opportunity of the Viking to license pictures from you?

A. It doesn't have any.

Q. And what relationship does it have as to the award of any pictures to the Viking or anybody else that you have given adjustments to another exhibitor?

A. None.

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Q. What requirement did you place on the Viking Theatre to

(6415)

include any cash guarantees in its bids?

A. None. It was entirely up to him to put them in if he wanted to.

Q. Now, who decided whether the Viking or any other exhibitor made an offer on any Warner Brothers picture?

A. No one.

Q. Who determined whether any exhibitor would make an offer on any picture of yours?

A. It was up to the exhibitors themselves.

Q. What control did you have on whether Stanley Warner or Goldman bid against each other on any Warner Brothers pictures?

A. Well, I had no control over whether Warners bid Stanley—Stanley Warner bid against Goldman. I had no control over that.

Q. What control did you have on whether any other exhibitor bid against Stanley Warner or against Goldman or both on any Warner Brothers pictures?

A. None.

Q. After making a bid is an exhibitor free to withdraw his bid before you accept it?

A. Yes. There is a time limit in the bid blanks.

Q. And even if there is no time limit, is an exhibitor free to withdraw a bid before you accept it?

(6416)

A. Yes, he is.

Q. What effect did the split between Stanley Warner and Goldman Theatres have on the opportunity of the Viking or any other exhibitor to license Warner Brothers pictures?

A. Well, it was an opportunity in favor of any of the other exhibitors that were interested in my product in first run Philadelphia. By splitting the pictures you were cutting them in half, and if the Viking or any other theater that is interested in downtown, they are only bidding against one theater instead of two, like Stanley Warner and Goldman, they are only bidding against one or the other.

Q. What insurance did Stanley Warner or Goldman have that they would get Warner Brothers pictures that were on their respective sides of the split?

A. They had no assurance. They had to compete for them.

Q. You have described fully the experience on SERENADE. Just answer one question for me. Was there or

was there not a change in availability of the picture SERENADE from April 21?

A. No, sir, no, sir.

Q. Now, with respect to the picture GIANT, who bid on GIANT for first run Philadelphia?

A. Mastbaum and the Viking.

Q. Just to refresh our recollection, the Mastbaum has 4387 seats, is that correct, by your recollection?

(6417)

A. By my recollection, yes.

Q. And the Viking 1017?

A. Yes, sir.

Q. What was the running time of GIANT?

A. Three hours and 20 minutes.

Q. Was that running time a significant factor in your determination of the theater that should play this picture and on the merits of the two bids that you received for it?

A. Indeed it was.

Q. Would you explain that to us.

A. Well, it was a picture that ran three hours and 20 minutes, that is a lot of running time in a theater. To take a picture like that and put it in a theater like the Viking, the turnover would be very, very slow, whereas in the Mastbaum Theatre, with my 4300 seats I had a ratio of four to one seating capacity, and it was all in my favor to put the picture in the big seating theater where I could get the most money out of it.

Q. And to what theater was the picture awarded?

A. The Mastbaum.

Q. Who made the recommendation in your company that the Mastbaum offer be accepted?

A. Me.

Q. And what did your company do as a result of that recommendation?

(6418)

A. They accepted my recommendation.

Q. What motivated you in recommending the award of GIANT to the Mastbaum Theatre?

A. Well, I recommended the Mastbaum Theatre because primarily I am interested in getting film rental for the picture and I figured by going into the Mastbaum, putting this picture into the Mastbaum, with its large seating capacity and its ability, you know, to take care of the crowds that we would be much better off, and it subsequently proved that, too.

Q. Did you or did you not have in mind any injury to the Viking Theatre when you made that award?

A. Oh, no.

Q. Who in your company made the recommendations as to the acceptance or rejection of bids or offers for Warner Brother pictures first run Philadelphia during the period of this lawsuit?

A. I did.

Q. And what did your company do as a result of all of these recommendations?

A. Well, they followed them.

Q. In each case if you advised the acceptance of a bid was it accepted?

A. Yes, sir.

Q. And if you advised the rejection of an offer was it

(6419)

rejected?

A. Yes, sir.

Q. Again I ask you, what motivated you or your company in making these decisions?

A. It was primarily to protect Warner Brothers in this respect: We placed these bids in the theaters wherein we thought we could get the most rentals for Warner Brothers pictures. That was the only thing we had in mind.

Q. And were any of those decisions made with the purpose in mind of doing any injury to the Viking Theatre?

A. No, sir.

Q. What effort did any exhibitor or any other distributor or anyone else exert to affect your company's judgment with respect to the licensing of any pictures to the Viking?

A. None.

Q. What influence, if any, was attempted to be exerted upon you by any of them with respect to the granting or refusal of any privilege given to any other exhibitor?

A. None.

Q. What effort, if any, was exerted upon you by any other exhibitor or any other distributor or anyone else in any of your dealings between you and the Viking Theatre?

A. None.

Q. Did Warner Brothers have any agreement, arrangement or

(6420)

understanding with any other distributor or any other exhibitor or anyone else with respect to the treatment that the Viking would receive on Warner Brothers pictures?

A. No, sir.

Q. In each case was your determination of the treatment given to the Viking on the acceptance or rejection of bids or any other dealing with them based on the sound business judgment of benefit to your company?

A. Yes, sir. In every instance.

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(6440)

RE-DIRECT EXAMINATION

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(6441)

By Mr. Sawyer:

Q. Now, the motion picture GIANT, Mr. Mansell, you were primarily interested, you said, in obtaining film rental?

A. Yes, sir.

• • •

Q. You had a clause in your contract for GIANT, did you not, that gave you as the distributor the sole discretion as to when that motion picture would be—the run would be terminated?

A. I believe we did; yes.

Q. And did you say your sole consideration was how much film rental you could get for Warner Brothers?

A. Yes, sir.

Q. And that was a picture, was it not, that—where the Mastbaum terminated the run and it was earning $16,000 in the

(6442)

last week?

A. That wasn't anything unusual.

Q. No, not whether it was unusual or not, Mr. Mansell. First, did they do that?

A. Did the picture come off?

Q. Yes.

A. It terminated on December 27, I think was the date.

Q. And that was because, you said, was it not, that the Mastbaum had another motion picture they wanted to put in there for the holiday?

A. Yes. That is—that is what I said. It wasn't anything unusual for them—

Q. But that—

A. —to do that.

The Court: Let him finish.

Mr. Sawyer: All right.

The Witness: It wasn't unusual for us to do that, to terminate a run.

For example, in this particular instance, GIANT was terminated on December 27. I think that is the correct date. You are now in—in the prime playing

time of—of the motion picture busines—you know, the Christmas opening—and they wanted to get a—naturally, a fresh picture for New Year's Day. They—

(6443)

By Mr. Sawyer:

Q. They wanted to, the Mastbaum?

A. I imagine they did, yes—

Q. Well, sure.

A. —and, I mean, they wanted—they asked me to relieve them.

Q. And Warner Brothers would have earned film rental during this prime holiday playing time if GIANT had continued on, would it not?

A. Yes, but not as much as we would have liked to have earned, and it would have created a hardship on them, too, because, don't forget, we were in the seventh week of the run, and we—and we were in this great big Mastbaum Theatre that had played to a lot of people during that run, and they—and it was starting to go out. The only reason probably we had that fifteen thousand was on account of the Christmas holiday in there. Now, that may have been—

Q. Well, $15,736 in a week, and you were playing most of that week, were you not, in the bad days before Christmas,—

A. Well, you had—

Q. —in the weak days the week before.

A. You had three—split it was, three—

Q. Well, wait a minute.

A. Yes. You had—you had Christmas Day and the day after

(6444)

Christmas, which is a terrific day.

Q. Very well; and all the days—

A. Because if you go unitwise from Christmas Day on to the termination of the engagement, you would almost

have to agree that it is a minimum of 50/50 split on the units.

Q. Now, Mr. Mansell, isn't it true that if that last week, which was almost $16,000, there is only one good playing date in that week, and that is the day after Christmas?

A. No. Oh, no. I wouldn't agree to that.

Q. Well, I take it that Christmas Day itself—

A. Christmas Day itself—

Q. —is not a good day?

A. —is a good day downtown in Philadelphia. It is not as good as New Year's, but it is still a good day.

Q. And how is the week before Christmas?

A. That is a—that is a little weak.

Q. It is the weakest week in the year, isn't it?

A. As a rule; yes, sir. That is not the weakest in the year. No. Holy Week is the worst week in the year. That is the one that really kills you.

Q. So it is the second weakest, then, in the year?

A. Yes. It could be.

Q. And so in that week with one day which is the day following Christmas of a good day, Warners—excuse me—the

(6445)

picture having grossed $15,736, do you have any doubt that in the next week, which was the Christmas week, that you would have earned for Warner Brothers a substantial film rental on that motion picture had it remained there?

A. Well, it is problematical. The picture had already played seven weeks and had grossed a pretty good amount of money, and there wasn't that much—

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The Witness: There wasn't that much left.

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(6462)

JAY WREN, recalled.

DIRECT EXAMINATION

The Court: Proceed.

Mr. Sawyer: Mr. Wren, you have been sworn and you have been identified.

By Mr. Sawyer:

Q. Did you, sir, make a calculation which shows the dollar volume of the gross obtained at each of the defendant theatres in Philadelphia?

A. Yes, we did.

Q. During the period of this suit?

A. Yes.

Q. Did you also include in that gross of the Viking Theatre during the same period?

A. Yes, sir.

Q. Did you also compile a list of the film rentals paid by each theatre during the period in suit?

A. Yes, sir.

Q. Did you then calculate the difference between the gross and film rental?

A. Yes.

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(6463)

Q. Now, Mr. Wren, given a downtown first-run theatre in good physical condition what determines the gross of that theatre?

A. The quality of the motion pictures it exhibits.

Q. Now, with respect to the grosses I invite your attention—you can look at your typed version if it is easier than looking at the list. Will you give us the gross obtained by the Stanley Theatre during this period?

A. Yes, sir. $1,605,477.22.

Q. Now, given a certain gross in a theatre, what determines the financial success or failure of the theatre?

A. The amount of the film rentals that that particular theatre must pay for its films.

Q. Will you give us the amount of film rental paid by the Stanley Theatre during the period?

A. Yes, sir. The Stanley Theatre paid $685,660.65 film rental.

(6464)

Q. Now, sir, I invite your attention to a third column which we have labelled here "Gross Minus Film Rental."

A. Yes, sir.

Q. And what does that column represent?

A. That is the gross business less the film rental paid by that particular theatre.

Q. And what is it for the Stanley Theatre?

A. For the Stanley Theatre it is $919,816.57

Q. Now, Mr. Wren, as to Schedule A, which we have before us in enlargement, was this caluculation made for each of the defendant theatres first-run Philadelphia during this period?

A. It was.

Q. Do the figures listed next to the theatre's name immediately to the right thereof represent the boxoffice gross of that theatre during the period in suit?

A. Yes, sir, it does.

Q. And the next column represents the amount of film rental paid by that theatre for its film?

A. Yes, sir.

(6465)

Q. And the last column, the amount left over after that film rental was paid out of gross?

A. That's right, sir.

Mr. Sawyer: Well, then rather than to read all of those figures in, the stenographer may be given a sheet, since the figures are exhibited to everyone, so that they will show in the record.

SCHEDULE "A"

Theatre	*Gross*	*Film Rental*	*Net*
Stanley	$1,605,477.22	$ 685,660.65	$ 919,816.57
Mastbaum	1,771,188.13	691,594.82	1,079,593.31
Fox	1,987,496.51	729,851.34	1,257,645.17
Midtown	1,239,419.37	521,825.56	717,593.81
Randolph	2,097,366.86	1,003,714.28	1,093,652.58
Goldman	1,562,481.40	514,641.84	1,047,839.56
Stanton	991,979.24	381,196.13	610,783.11
	(11,255,408.73)	(4,528,484.62)	6,726,924.11
Average			960,989.16
Viking	1,200,357.08	630,487.80	569,869.28
			$391,119.88

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(6466)

Q. Mr. Wren, what does this figure here represent, sir, if you please (indicating)? First of all, would you read that figure.

A. $6,726,924.11, which represents the total amount left that the seven defendant theaters had after paying film rental.

Q. And this figure here which correspond across to where I reach, what is that figure and what does it represent (indicating)?

A. That is the average. In other words, dividing $6,726,924.11 by 7, the average is $960,989.16.

Q. Mr. Wren, we have down here the Viking, do we?

A. Yes, sir.

Q. And what is this figure and what does it represent?

A. The $1,200,357.08 represent the gross receipts of the Viking Theatre for the period of this suit.

Q. And this figure here, sir (indicating)?

A. The $630,487.80 represents the amount of film rental paid by the Viking Theatre.

Q. And then this figure here (indicating).

A. The $569,869.28 is the amount that the Viking Theatre had left after paying film rental.

Q. And this caluculation—when I say this calculation, I

(6467)

point first to the 960 figure and then to the 569 figure and then to the 391 figure, mathematically what have you done there?

A. We have subtracted the amount that the Viking had left after paying film rental from the average that any one of the defendant theaters would have left to arrive at a total of $391,119.88 as the amount of damage claimed by the Viking.

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(6470)

CROSS-EXAMINATION

By Mr. Nizer:

Q. Mr. Wren, you are not an accountant, are you?

A. I beg your pardon?

Q. You are not an accountant?

A. No, sir.

Q. Nor a statistician?

A. No, sir.

Q. Nor an economist?

A. No, sir.

Q. And you have never drawn any alleged damage schedule before in your life, have you?

A. No, sir.

Q. You have never testified as an expert before in your life, have you?

A. No, sir.

Q. And you have told us you have never been a distributor of

(6471)

motion pictures ever in your life?

A. That is right, sir.

Q. You have also told us, so that we don't have to go over it, that you never operated a first-run theater downtown Philadelphia on national release date until this Viking Theatre. You never had any other prior—

A. I have so testified.

Q. And even in this theater, you came into this theater, which was your first experience at this time, about seven or eight months after the theater opened, during the period of this lawsuit is that right?

A. I came in at the end of February, 1955, yes, sir.

Q. Now, was it you or your attorney who compiled that (indicating Schedule "A")?

A. Both of us, sir.

Q. And how long did it take you to prepare that?

A. I guess a matter of days.

Q. Days?

A. Two or three days.

Q. Two or three days?

A. Yes, sir.

Q. To just put those figures down?

A. Yes, sir; to work on them.

Q. Did you also have basic records from which these

(6472)

computations were made?

A. I don't understand the question, sir.

Q. Did you just have these conclusions, these figures, or did you have records which you analyzed, which you computed the total that you put on?

A. There had to be a compilation of the grosses of the various theaters plus a compilation of all the film rentals, sir.

Q. And did you in getting those grosses go over the motion pictures which comprised the total of gross?

A. By and large yes, sir.

Q. You did?

A. Yes, sir.

Q. In each case, that is, for the Stanley Theatre you went over all the pictures they played and the grosses for each picture and totaled them together for the period; is that what you did?

A. We'd have to, sir, to get the gross.

Q. And that is what you did yourself?

A. Together with counsel, sir.

Q. I say you worked on it though?

A. Yes, sir.

Q. So that you went over in each of those seven theaters that you have there, you have gone over the gross receipts of

(6473)

each of these theaters picture by picture and totaled them together to get to that figure; is that right?

A. Yes, sir.

Q. Have you got the documents or any memoranda from which you made that calculation picture by picture, the gross of each picture?

A. Oh, no, sir.

Q. What did you do, throw them away?

A. In all probability. They were left in the former counsel's office with the exception of the Stanton change, there, sir.

Q. When was the last time you saw them, sir?

A. I couldn't honestly tell you, Mr. Nizer.

Q. Give us your best approximation, please.

A. A year, a little longer than that, sir.

Q. Was the last time you saw them. And this chart has been made up for a year?

A. No, sir. This chart was only made recently, sir.

Q. I don't mean the blow-up, I mean the typewritten copy from which that is an enlargement, was that made a year ago, about?

A. A year or a little longer, yes, sir. It is part of the record, sir.

Q. Isn't it a fact, Mr. Wren, that you never, in your presence there never was gone over picture by picture the grosses that total the amounts you have in that first column?

(6474)

A. No, sir, that is not the truth.

Q. Didn't you just get a total figure rather than a breakdown of each of the pictures that played there or do you say you went over the breakdown?

A. Yes, sir.

Q. And did you personlly write down those figures for each picture?

A. Some of them, yes, sir.

Q. And you did some and your attorney did others; is that what you imply?

A. Yes, sir.

Q. How did you divide that task? He just took some and you took some?

A. Yes, sir.

Q. Did you make the totals of them?

A. No. I believe an adding machine made the totals of it, sir.

Q. Did you operate the adding machine?

A. No, sir, I did not.

Q. When was the last time that you were inside the Goldman Theatre, if at all?

A. Well, I have been in the Goldman Theatre, sir—I am trying to remember the last time.

Q. Yes.

A. After they took out some stores and put in the tremendous

(6475)

standee area.

Q. Don't give me how you did it. Give me a date.

A. Whenever that date was, whenever they took out stores.

Q. Have you an approximate time? What year?

If I told you that that was before the period that this litigation began, the taking out of the stores, if that is the way you identify it, would you say that the last time that you visited was before the period of the suit?

A. No, sir. What I am trying to indicate was I was there before they took out the stores.

Q. Give us a date.

A. I'd say about a year and a half ago.

Q. Before they took out the stores?

A. No. I say before I was in when they had the stores in; I think it was after GONE WITH THE WIND they enlarged the standee area which was before the period of the suit, yes, sir.

Q. That would be, what did you say, a year and a half ago?

A. About that, yes, sir.

Q. When were you last in the Stanley Theatre?

A. For a screening of a Universal picture.

Q. No. Just when. Let's keep this to the barebones, so that we can make progress.

A. I am trying to, sir.

Mr. Sawyer: To make progress, to keep it to the barebones—I object to this line as being immaterial as to

(6476)

when he was, but if he is going to be asked the witness would have to search his recollection.

The Court: Yes.

Mr. Sawyer: I don't see any reasons for the questions.

The Court: He can try to identify the time and occasion.

The Witness: Universal screened a—

By Mr. Nizer:

Q. You can go through your process. Just give me the date after you thought it through. You don't have to tell me all the events.

Mr. Sawyer: I object to the line, Your Honor, as immaterial, as highly irrelevant and as outside the scope of the witness on this here direct testimony.

The Court: Overruled.

The Witness: Well, I was in the Stanley Theatre just before the opening last November, just before the opening.

By Mr. Nizer:

Q. Last November was the time?

A. Yes, sir.

Q. And the Randolph, were you in there, and, if so, when last?

A. Six or seven months ago, sir.

Q. And the Fox Philadelphia?

(6477)

A. Fox Philadelphia right after the Milburn interests took it over, sir.

Q. Give me a date, please, approximately.

Mr. Young: August, 1959 is when we took it over.

The Witness: August or September, that is about it.

By Mr. Nizer:

Q. August or September, 1959?

A. Yes, sir.

Q. That would be roughly almost two years ago?

A. Yes, sir.

Q. And the Mastbaum, when were you last at the Mastbaum, if you were in there at all?

A. Just before they demolished the Mastbaum, sir.

Q. Pardon?

A. Just before they demolished the Mastbaum, right after they put the new marquee, after the new marquee and the alterations had been made to the front.

Q. Again just give me a date. That is all that I want, an approximate date.

A. I cannot remember any time, sir, on the thing.

Q. What year?

A. About three years ago I would say.

Q. And what was playing at the Goldman Theatre when you were

(6478)

there?

A. I can't remember, sir.

Q. Even though it is a competitor of yours you don't recall that?

A. No, sir, I do not.

Q. What was playing at the Stanley Theatre when you were there?

A. I told you it was before the opening of PILLOW TALK, and prior to that I was there on the screening of the rushes in the morning.

Q. When you were there was it PILLOW TALK?

A. No. PILLOW TALK had not opened yet, sir. They had just remodeled the theater.

Q. I see. Now, when were you last at the Randolph? You have given me that. What picture was playing there, do you recall?

A. I don't know whether it was 30 or—I can't recall the picture, sir.

Q. And when were you last at the Stanton Theatre, if at all?

A. SERGEANT RUTLEDGE.

Q. Date, approximately.

A. Whenever that played, sir, eight, nine months ago, maybe longer.

Q. And the Midtown?

(6479)

A. The Midtown as recent as the screening of 101 DALMATIANS.

Q. And before that, the last time before that?

A. One of the performances, part of a performance of ALAMO, sir.

Q. Have you any idea of the time?

A. No, sir, I do not.

Q. All right. In making that computation, Mr. Wren, you took the entire gross receipts of each of those theaters for the entire period—let's break it down to a year, for instance—you took it for the whole period of the lawsuit but let's suppose for a year, you took all of the gross receipts of that theater for a whole year; is that right?

A. For more than a year.

Q. Well, I say for the whole period but, for example, if we were to split it up for the sake of this discussion into a year—of the period of the lawsuit, let's take a year's period, you would take all of the gross receipts at that theater for the entire period of a year and then for the next period of a year and then for the rest of the balance of the period of the lawsuit; is that right?

A. Yes, sir.

Q. And then you compared that gross, you say, with the entire gross receipts for the same period of a year or the next year, period of the lawsuit, with the Viking; is that right? All the

(6480)

gross receipts.

A. Yes, all of it together.

Q. For example, if you take the Stanley, which is the first one in Column 1—may I call this Column 1 so that we don't have to—

A. The gross column.

Mr. Nizer: Suppose we call this Column 1. You don't mind, do you, Mr. Sawyer?

Mr. Sawyer: No, I do not.

Mr. Nizer: All right. Just let's call it Column 1 so that we don't have to describe it in more verbiage.

By Mr. Nizer:

Q. Now, if you look at Column 1 and you take the Stanley Theatre and the gross there, that includes every picture that played during that entire period of the lawsuit, doesn't it, at the Stanley Theatre?

This is one million six.

I will call this Column 1, too. I will rub this off

This gross here takes in every picture that played during the entire period, all the gross receipts, correct?

A. Yes, sir.

Mr. Sawyer: Excuse me, Mr. Nizer, don't we

(6481)

have two 1's now?

Mr. Nizer: I struck out the first.

Mr. Sawyer: Column 1 is the first column, all right.

Mr. Nizer: the gross.

By Mr. Nizer:

Q. Is there any reason why you didn't put down the total of Column 1?

A. Not that I can think of. I have it on my sheet.

Q. Well, suppose I supply the total.

Mr. Nizer: May I put that in, Mr. Sawyer?

Mr. Sawyer: Yes. We have no reason in particular. Put it in.

Mr. Nizer: $11,255,408.73.

By Mr. Nizer:

Q. Is there any reason why you didn't total the—I will call this Column 2 and this Column 3.

Is there any reason why you didn't total Column 2, that you can think of?

A. No, sir, I cannot.

Mr. Nizer: All right. Do you mind if I supply that, Mr. Sawyer?

Mr. Sawyer: No, of course not.

The Witness: It is on my sheet.

(6482)

By Mr. Nizer:

Q. It is on your sheet?

A. Yes.

Q. Will you read it off?

A. $4,528,484.62.

Q. Now, that gross of $11 million at the bottom of Column 1 represents the total gross receipts of every motion picture that played at those seven motion picture theaters that you have listed there?

A. Yes, sir.

Q. Of course, the seven theaters that you have listed there do not include all of the first-run theaters; they are only the defendants' theaters?

A. That's right, sir, the defendant exhibitors.

Q. Now, the larger of that gross of $11 million, which I will call in round numbers $11 million, in Column 1, the larger the average which you made of that—do you see this average figure here, this $960,000?

A. Yes, sir.

Q. The larger that figure is the larger this figure is (indicating)?

A. I didn't understand you, sir.

Mr. Sawyer: No. All right, let him answer.

(6483)

By Mr. Nizer:

Q. The larger that the gross is here, the larger this $960,000 is when you divide it by 7. If this were $15 million, this would be a larger figure; if this were 8 million, this would be a smaller figure, wouldn't it?

Mr. Sawyer: Mr. Nizer, I don't want you to misunderstand, that $960,000 is not the 11 million divided by 7.

Mr. Nizer: No. It becomes this—I am cutting through it.

By Mr. Nizer:

Q. The larger your gross is the larger this figure becomes, is that so?

A. Yes.

Q. And the smaller this gross is the smaller this figure becomes from which you got your conclusion?

A. Depending on your film rental in between, it goes without saying.

Q. I say that is subtracted from it, of course.

A. Yes.

Q. Therefore, if in Column 1, let's assume by some error, there are amounts in Column 1 that shouldn't be in Column 1, just assume that for a moment, then the 11 million would become smaller, wouldn't it?

A. Based on that assumption, naturally.

(6484)

Q. And, therefore, the Column 3 conclusion would be smaller proportionately, wouldn't it?

A. Based on that assumption, yes, sir.

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(6485)

Q. But, in any event, you did not include the other first-run theaters, such as the Arcadia, Trans-Lux, did you, other theaters operated by non-defendants?

A. No, sir.

Q. And your position then is, so far as at least that chart is concerned, Schedule "A," that it should be limited to the defendant theater exhibitors?

A. Yes, sir.

(6486)

Q. And do you also claim that the gross receipts at those theaters should be limited to the defendants' motion pictures that played there?

A. No—to the motion pictures that played there, sir.

Q. I am saying, are you willing or are you trying to say no to my answer? Are you similarly willing to limit the motion pictures which you are including in the gross to those that belong to the defendants that I represent, Loew's, Universal, RKO?

A. No, sir. I am limiting it to the films that played these particular theaters.

Q. I see; well, then, by limitation you mean you are not limiting it; you are including everything that played there?

A. Yes, sir.

Q. Even if they didn't belong to the defendants?

A. Oh, yes.

Q. That is what you are saying?

A. Belong to the defendant who, sir?

Q. The defendant distributors, if—

A. That is right, sir.

Q. Well, now, let's see, then. So that you are now telling us that in Column 1 your grosses for these various theaters included grosses on motion pictures which none of the defendants in this case, distributors, distributed at all; correct?

(6487)

A. Yes, sir.

Q. For example, Walt Disney distributes through his own company called the Buena Vista Company, doesn't he?

A. Yes, sir.

Q. That is not associated with any of these defendants that are in this courtroom, is it?

A. Not to my knowledge.

Q. And Walt Disney, for example, had a picture called 20,000 LEAGUES UNDER THE SEA. It was an outstanding picture, wasn't it?

A. Yes, sir.

Q. And that picture played at the Mastbaum?

A. Yes, sir.

Q. Now, you have included the gross receipts from that picture in Column 1, even though it was distributed by the Buena Vista Company and not by Loew's, RKO, Universal, or any of the companies here?

A. Yes, sir.

Q. Republic Pictures is not a defendant here, is it?

A. No, sir.

Q. Now, they have distributed pictures like VANISHING AMERICAN which are included there, haven't they?

A. Yes, sir.

Q. LISBON?

(6488)

A. Yes, sir.

Q. OUTCAST?

A. I will accept that, sir.

Q. SHANGHAI STORY?

A. I am not sure that was theirs, sir.

Q. Well, I can tell you it is—

A. All right.

Q. —but we won't stop on it. SHE WOLF?

A. If that was theirs.

Q. Republic; yes. FLAMINGO ISLAND and others, and you have included all of these—

A. Yes, sir.

Q. —of Republic Pictures, even though Republic Pictures has not been sued here and is not one of the defendants?

A. Right, sir.

Q. But you put all those figures in that Column 1, didn't you?

A. Yes, sir.

Q. And among the others of Walt Disney's that are in that Column 1, distributed by Buena Vista, are VANISHING PRAIRIE; right?

A. Yes, sir.

Q. And DAVY CROCKETT—

A. Yes, sir.

Q. —among others; and all of the gross receipts of those

(6489)

pictures have all been put into Column 1, even though they do not belong to any of the defendants in this case; correct?

A. Yes, sir.

Q. Now, there is a picture called OKLAHOMA. That was an outstanding picture, wasn't it?

A. How do you mean, sir?

Q. Well, in large gross. Didn't it gross $181,000 at the Midtown Theatre?

A. At 2.75, sir, entirely different rate. It wasn't on a continuous-performance basis.

Q. I am not not quarreling about that. I haven't asked you. This is a picture you had no interest in at all, is it?

A. Oh, I beg your pardon, sir.

A. We have an interest in all films.

Q. Just hold that. We will come to OKLAHOMA. For

Q. Well, just hold that.

the present, let us stick to this one point so we don't confuse

it. OKLAHOMA is not distributed by any of the motion picture companies in this case, is it?

A. No, sir.

Q. What is the name of the distributor?

A. I think OKLAHOMA was Magna.

Q. Magna; correct?

A. Yes, sir.

(6490)

Q. And you have taken a motion picture by a company called Magna, with that $181,000 gross, and you have put that into Column 1, haven't you?

A. Yes, sir.

Q. And then there is a company called Screen Guild. Have you ever heard of that?

A. Yes, sir.

Q. What pictures did they distribute, sir? Can you mention a few?

A. At one time they distributed some of the Leppert pictures. The titles escape me at the moment, sir.

Q. Well, didn't they distribute Selznick's DUEL IN THE SUN?

A. On a reissue basis; yes, sir.

Q. Yes; and do you know how much money that grossed that you got in there?

A. I can't remember now; no, sir.

Q. Have you got any of the records of the amount of money that you included of that picture?

A. No, sir.

Q. Did you have available for you the amount of money that that picture grossed by going to the Screen Guild or Magna and finding out about it?

A. No, sir.

Q. Did you have the records even of the exhibitors with

(6491)

respect to those particular pictures?

A. Well, we were getting exhibitors' figures the same as they get ours, sir.

Q. If I told you that it was $26,000 income on DUEL IN THE SUN, would you say that you have included that into that column?

A. When you mean $26,000—

Q. Gross.

A. —income, to whom, sir?

Q. Gross.

A. Screen Guild?

Q. Gross.

A. Gross? I would assume we did; yes, sir.

Q. And then there is DCA, Distribution Corporation of America; they had pictures that are included in this, even though they are not one of the defendants; correct?

A. I believe LONG JOHN SILVER was one.

Q. That is right. So it is. Now, let us take a look at whether these moneys are somewhat substantial. The Buena Vista Company—that is the Walt Disney—20,000 LEAGUES UNDER THE SEA, do you know how much money you included of that company in Column 1?

A. I can't remember now, sir; no, sir.

Q. Suppose I told you that it grossed $109,000. Have you

(6492)

put that $109,000 into Column 1?

A. Undoubtedly.

Q. "Undoubtedly," did you say?

A. Yes, sir.

Q. Now, you never made an offer for Buena Vista, the Walt Disney picture, for the Buena Vista distribution of 20,000 LEAGUES UNDER THE SEA? Did you ever make an offer for that?

A. I don't believe we did; no, sir.

Q. You are not—you weren't interested in getting this picture for the Viking; isn't that a fact?

A. I can't remember the play dates of it, sir.

Q. Well, but so far as your recollection goes, did you ever have any interest in that picture?

A. No. I think it was before my time. That is what I am trying to indicate to you, sir.

Q. Well, to your knowledge, since you are testifying to the entire schedule for the entire time, to your knowledge did the Viking ever have any interest in it?

A. I told you I didn't believe we had, sir.

Q. But you have, nevertheless, included that $109,000 in there?

A. Yes, sir.

Q. And, of course, by including $109,000, we have already seen that that makes that $11 million, which otherwise would

(6493)

be at least, if this one figure were taken, $109,000 less, and therefore, this last figure here would be less, wouldn't it?

A. Based on that assumption; yes, sir.

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(6494)

Q. By including that $109,000 on the Buena Vista picture, not a defendants' picture, you are in effect claiming damages against the defendant distributors in this case to the extent of any proportion of that picture as it reflects itself in Column 3, aren't you?

• • •

The Witness: Yes, sir.

By Mr. Nizer:

Q. Incidentally, when you went over the records, as you say you did, you were conscious then of the fact that you were including even a year ago when you said you made this up, according to you—

A. Maybe longer than that, sir, I said. A year or so ago, I believe I said.

Q. Well, what would you like to have it, your best

(6495)

recollection?

A. Whatever I said to begin with, sir, but I didn't say, pinpoint it as of one year ago, sir.

Q. Well, what did you say before? I just want your best recollection.

A. Whatever is there, sir. I said a year or so ago.

Q. You don't remember—

A. No.

Q. —between then and now—

A. No. I do not, sir.

Q. —when you made this?

A. But I don't remember pinpointing it to one year.

Q. Well, I ask you now so that we will have it.

A. It is over a year, sir.

Q. Is it more than two years?

A. It could be.

Q. Is it more than three years?

A. No. I doubt that, sir.

Q. So now you say it could be more than two years and it could be something less than three years, too, could it?

A. It could be less than two years, too, sir.

Q. What is your very best recollection? Give it to me now so that we will have your best judgment. How long ago did you prepare this?

(6496)

Mr. Sawyer: Your Honor, I don't see how the witness could answer any more than he has on that.

The Court: Objection overruled.

The Witness: Between two and three years ago, sir, as best I can remember.

By Mr. Nizer:

Q. Between two and three years?

A. Yes.

Q. Now, did you at that time—have you saved any of the basic material from which you made that computation? Have you got any of it or have you—

A. I haven't a bit of it; no, sir.

Q. Not a word of it?

A. It was all in counsel's office at the time this thing was compiled, sir.

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(6497)

Q. Did you observe when you put in these calculations, for example, 20,000 LEAGUES UNDER THE SEA, that it was not a defendants' picture; you knew it at the time, didn't you?

A. Certainly.

Q. So you did that deliberately?

Mr. Sawyer: Objected to, Your Honor.

By Mr. Nizer:

Q. You did that with full consciousness?

Mr. Sawyer: I object to the characterization.

The Witness: Yes, sir. I said we did.

Mr. Sawyer: I object to the characterization.

The Court: Well, he did it purposefully.

Mr. Nizer: Purposefully.

The Court: That is, he included it.

Mr. Sawyer: He didn't—well, deliberately, Your Honor, is what I object to. He did it knowingly.

The Court: Well, he did it.

Mr. Sawyer: Yes.

The Court: All right.

Mr. Sawyer: The question was asked before he (6498)

said it.

The Court: All right.

By Mr. Nizer:

Q. You did it with full consciousness of the fact that it was not a defendants' picture?

A. Yes, sir.

Q. And did you also observe that in the first week that particular picture, 20,000 LEAGUES UNDER THE SEA, took in almost $44,000 in one week at the Mastbaum Theatre as against your highest—

Mr. Sawyer: Objected to.

By Mr. Nizer:

Q. —weekly gross of $34,000 at the Viking Theatre?

Mr. Nizer: And the reason, if there is an objection for this being pertinent, Your Honor, is that comparability is part of the issue with respect to the admissibility and propriety of this charge.

Mr. Sawyer: Well, I suggest, Your Honor, that if we have once again weekly grosses and comparisons and whatnot, that this cross-examination and then the redirect based on it and then perhaps the recross on that will be interminable, and that this seems to me is not pertinent to the the direct. This one question is probably not objectionable, but if we are going to go through this, I think we would be

(6499)

outside the scope, Your Honor, of the direct examination.

The Court: Well, I do think, Mr. Sawyer, it goes to the question as to whether it is a proper comparison.

I will overrule the objection.

By Mr. Nizer:

Q. You said a moment ago that you didn't keep a single item of this data which you put into Schedule "A." And did your counsel have—does he have it, to your knowledge?

A. I do not know, sir.

Mr. Nizer: May I call—

The Witness: I told you it was left in counsel's office. I didn't take it with me.

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(6506)

Q. You take that first theatre, the Stanley, we have already had the size of it, it is three times the size of the Viking, is it not, about?

A. During the period of the suit?

Q. Yes.

A. It was less than three times.

Q. How many seats did we agree upon, what, 2900?

I say approximately three times. It is 2900 as against 1017. 2900 against 1000.

Mr. Young: 2932.

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By Mr. Nizer:

Q. 2932, isn't that approximately three times?

A. Yes, sir.

Q. All right, so you have taken a theatre that had three times the seating capacity and you are counting the receipts at that theatre of a picture which does not belong to any of the defendants; isn't that so? All pictures that don't belong to any of the defendants, you put that in it, don't you?

A. If they played them, yes, sir.

Q. Well, of course, if they played them. They did play them, that is why I am calling for these basic documents.

(6507)

I am not challenging the total, you see. Let me make it clear, Mr. Wren, even for your sake, so that there may be no misunderstanding. I am not challenging that the gross receipts at the Stanley Theatre was a figure that you have there. I am challenging how that figure was gotten to. That is what I am questioning you about. That is why I want the basic material.

A. Yes, sir.

Q. And it is true, of course; for example, take TWENTY THOUSAND LEAGUES UNDER THE SEA; that the more profitable that picture the larger your claim would be. The more profitable that picture was, the larger the gross, the larger your claim would be; that is correct, isn't it?

A. Depending again on the steps: The gross, the film rental paid and what was left.

Q. Of course, of course. Now will you answer my question. If you go through all these procedures which I am assuming all the time, the larger, the more profitable that picture TWENTY THOUSAND LEAGUES UNDER THE SEA was at that theatre, the larger your claim would be?

A. When you say "the larger" you mean the larger the gross?

Q. The gross, certainly.

A. Well, then there would be a larger film rental. So in

(6508)

proportion, yes, sir.

Q. Yes, I say, when you get through with the calculation the larger the claim will be?

A. Yes, sir.

Q. And the less profitable that picture would be the less that would affect the last column, is that correct?

A. Gross, film rental, steps, yes, sir.

Q. Quite true. And yet that picture the profitable nature of which may affect your claim is not even a defendant's picture, is it?

A. No, sir.

Q. And it isn't a picture that you had any interest in obtaining, is it?

A. You mean TWENTY THOUSAND LEAGUES UNDER THE SEA?

Q. That is right.

A. I think I have so testified. To my knowledge, I don't think they went after the picture.

Q. Now, let us take the Magna Company, because you told us it distributed OKLAHOMA.

A. Yes, sir.

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(6509)

Q. Now, $131,000 on Magna's picture OKLAHOMA, which is not distributed by any defendant in this case, you have also added into that column 1, haven't you?

A. Yes, sir.

Q. When I asked you about OKLAHOMA before and you said, oh, yes, we had some discussion with them, and I cut you off, I, therefore, want to give you a chance now. I said I would

(6510)

come back to it.

Is there anything you want to tell me about OKLAHOMA?

A. No. We did indicate a desire to play the picture, yes, sir.

Q. And didn't you also, although it is with another company, not any of these defendants—haven't you testified

that Mr. Sley told you, forget it, I don't want to have that picture; haven't you so testified?

A. After a series of incidents, yes, sir.

Q. Now, you have the Mastbaum there. That too played pictures not distributed by any of the defendants in this case, didn't it?

A. Yes, sir.

Q. And have you totalled from your basic material—because you certainly can't see it from that gross figure. Have you totalled the number of pictures that the Mastbaum played which you have in there which do not belong to any of these defendants in this case?

A. Have we totalled the number?

Q. Yes.

A. I don't believe so, sir.

Q. Would you know? You are qualifying this chart, would

(6511)

you have any idea about that?

A. Not at this time, sir, no, sir.

Q. If—

A. Probably with a check of the records I could find it.

Q. If counsel produces this basic material, then you could compute it, is that true?

A. Oh, certainly.

Q. So you want that basic material to answer that question, if you are required to answer it, isn't that so?

A. If you wish it, yes, sir.

Q. Now, in the meantime, subject to your looking at it, my calculation is—I want you to check it—that there are 14, about 15, I will say—maybe one more, about 15 pictures not belonging to the defendants which you have included in column 1. Would you say that that sounds about right, or would you have to check it?

A. At what theatre, sir?

Q. The Mastbaum.

A. I want to check it, sir.

Q. And will you also check and see whether that doesn't total a figure of almost $300,000 which you put into that column 1?

A. Yes, sir.

Q. Now, do you know how many non-defendant pictures, not

(6512)

belonging to any of the people you have sued here, played at the Stanton Theatre, which you added to that chart?

A. No, sir, I do not.

Q. Will you check and see if it isn't 43 pictures.

A. Yes.

Q. And if the figure doesn't, the gross that you have added in there, doesn't amount to several hundred thousands of dollars; will you check that?

A. Yes, sir.

Q. I don't need the precise amount, I just want to demonstrate the kind of figures you have in there.

A. Yes, sir.

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(6513)

Q. Now, Mr. Wren, subject to your having an

(6514)

opportunity to go into that, were there other pictures which are distributed by the defendants, but which you concede, admit, were properly awarded to any one of those seven theatres in the course of bidding or negotiation, and which you have nevertheless included in that column 1?

A. Every picture played at the listed theatres is included in column 1 gross.

Q. Well, that is a partial answer, but listen to my question, because it doesn't quite answer my question.

Have you included in column 1 pictures belonging to and distributed by some of these defendants which you had

an interest in, but concede in this courtroom were properly awarded to the Mastbaum or to the Randolph or to the Midtown? In other words, you have no grievance about it, there was a fair, open competition and they won them. Nevertheless, have you put those pictures in column 1?

A. Any picture that played in any first-run theatre that is a defendant in this action is included in column 1.

Q. And that would include pictures which you concede were properly awarded to others?

A. Naturally.

Q. And there are a good many of those, aren't there?

A. I do not recall, sir.

(6515)

Q. Well, let me see if I can refresh your mind. United Artists picture MAN WITH THE GOLDEN ARM, with Frank Sinatra and Kim Novack, do you remember that motion picture?

A. I do, sir.

Q. Is it not a fact that you concede in this court, through yourself and your counsel, that this picture you had no objection to its having been awarded, where it was awarded, to a competitor?

A. I believe my only objection on that was the rejecting of the original offer and rebidding it on MAN WITH THE GOLDEN ARM.

Q. Well, that hardly is an answer. Let me read something. Perhaps I can refresh your recollection and we can save time. Page 1068, your counsel, Mr. Sawyer:

> "We do not have an objection about this picture, Your Honor."
>
> "If they want to take it out of the case as far as I am concerned it is out."

I just read a part of the admissions on that. That is the MAN WITH THE GOLDEN ARM.

Now, will you accept your counsel's statement that that picture is out? Is that clear?

A. I have indicated the objection we had, sir, the Viking Theatre had.

(6516)

Q. No, Mr. Wren, I know you have.

I did not want to move to strike your answer as not responsive. I am therefore trying to cut short.

Will you accept your counsel's statement:

"We do not have an objection about this picture."

"If they want to take it out of the case as far as I am concerned it is out."

MAN WITH THE GOLDEN ARM.

A. Yes, sir.

Q. Do you agree with that statement, and is it out of this case, and you have no grievance of any kind?

Not what you once had. You have no grievance of any kind.

A. I have indicated the grievance we had, sir.

Q. And have you withdrawn that grievance and is it clear at this moment unequivocally that you have no grievance of any kind with respect to that picture today? Isn't that so?

A. Not unequivocally, no, sir. No, sir.

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(6518)

Q. Mr. Wren, perhaps we can agree if I read just a little more. I was trying to just give you one or two sentences.

(6519)

The objection was made.

"By Mr. Sawyer:

"Q. Now, Mr. Wren,"—

This was on direct examination, not on cross-examination.

"By Mr. Sawyer:

"Q. Now, Mr. Wren, with respect to the picture THE MAN WITH THE GOLDEN ARM.

"A. Yes, sir.

"Q. Who distributed that picture?

"A. It was distributed by United Artists.

"Q. Who was in it?

"A. Frank Sinatra, Kim Novack and quite an impressive cast of feature players."

There was an objection by Mr. Ward:

"This wasn't even listed as a grievance in the statement of contentions.

"Mr. Sawyer: Well, I do not thnk it is mentioned in the pretrial memorandum.

"The Court: Do you mean this particular picture?

"Mr. Sawyer: Yes, sir. Apparently, just as you see, Your Honor, I think there have been two or three of these. There are a couple of pictures that we are dealing with here. We do not have an objection about

(6520)

this picture, Your Honor.

"The Court: You do not have a complaint about this picture?

"Mr. Sawyer: No, but I don't want to put this man on the stand and then have them say: 'Ah, that you didn't talk about this bid' and so on."

And then he goes on:

"If they want to take it out of the case, as far as I am concerned it is out.

"The Court: Well, I think you are anticipating what they might do. Therefore, if they do it, you can cover it in redirect."

It was never brought up again, so far as I know. The picture was out.

Now, under those circumstances do you stand by your counsel's statement or do you wish to repudiate it?

A. Just what I have indicated, sir.

Every gross of every picture played at the Stanton—

The Court: That is not an answer.

Mr. Nizer: That is not an answer.

The Witness: I will stand by counsel's decision.

The Court: Do you agree with what Mr. Nizer read?

(6521)

The Witness: I will stand by counsel's decision, yes, sir.

By Mr. Nizer:

Q. Therefore, this picture being out of the case, do you know how much money you added into that Schedule 1 on that picture for which you are now asking damages, what the gross was at the Stanton Theatre?

Again, you haven't—

A. About $140,000.

Q. $158,071, and you put that $158,000 into that Schedule 1?

A. I have said I had, sir.

Mr. Nizer: Now, to save time, I will simply state for the record, subject to Mr. Sawyer's objection, that THE KING AND I was not listed in plaintiff's answers to interrogatories as one which is the subject of any complaint by the plaintiff, or in plaintiff's pretrial state-

ment, and at page 3448 Your Honor therefore upheld the fact that this picture was not in, and I now merely wish to read, subject to the witness' checking with his records overnight, the gross that was put into this picture, $246,855.

Mr. Sawyer: And will you read the film rental that was taken out?

Mr. Nizer: $98,147.

(6522)

Mr. Sawyer: Each time will you put both in so we have it?

Mr. Nizer: I will be glad to any time you wish the figure.

By Mr. Nizer:

Q. Therefore, you have added, even though you have no grievance on this picture, THE KING AND I—you have added into the gross receipts first $246,855 that goes into that total which gives you that average in column 3, haven't you?

A. I have said I have, sir.

(6523)

Q. And you have also deducted from it in column 2 $98,000 film rentals, so that you have left over about $150,000 on which to compute what you claim are damages, correct?

A. Yes, sir.

Q. On a picture that you have no grievance about and is nevertheless included in that calculation, correct?

A. I have said so, yes, sir.

Q. THAT CERTAIN FEELING, a Paramount picture, played at the Midtown Theatre. Have you not conceded that you have no claim whatsoever about that picture?

Would you concede that without my going through the record?

Mr. Sawyer: Objected to, Your Honor. This statement is no claim whatsoever. The question should be no objection as to how it was awardsd, not no claim whatsoever.

Mr. Nizer: I will stand by my question.

By Mr. Nizer:

Q. Do you not concede that you have no claim of any kind in this courtroom concerning the picture THAT CERTAIN FEELING? Isn't that a fact, Mr. Wren? Dealing with the facts, isn't that true?

A. I don't honestly recall, sir. The gross of a picture if it played there is in this column 1, sir.

Q. The gross was in there. You don't recall whether the gross is in. I didn't hear your comment.

(6524)

A. I say the gross is in there.

Q. Now I ask you, isn't the gross in there of a picture which you concede was properly awarded—

Mr. Sawyer: That is different.

By Mr. Nizer:

Q. —was properly awarded to the Midtown?

A. I have indicated, sir, all of those pictures.

Q. Don't tell me what you have indicated. Answer my question. Do you?

A. All of those pictures are in there.

Q. Do you?

A. Yes, sir, including THAT CERTAIN FEELING.

Q. I am not asking you whether it is in there at this moment. Please listen to my question, Mr. Wren.

Do you concede that that picture which is in there is a picture which you concede was awarded properly to your competitor, the Midtown Theatre?

A. Yes, sir.

Mr. Sawyer: Objected to. That is repetitious, Your Honor. He has answered the question.

By Mr. Nizer:

Q. And do you know how much money was put into column 1 which you are still asking as to computation for alleged damages on the basis of a picture which you have no claim about?

(6525)

Do you know the amount?

A. Not at the moment, no, sir.

Q. Now, I am going to try to cut through this and not take you through each of these, but that is true of a good many other pictures, isn't it?

A. I will accept that, sir.

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(6526)

Q. The picture THE MOUNTAIN, that picture you withdrew from a comparison when you discovered that the advertising had been left out. The advertising was put in and it reversed your calculation and you say you withdrew that picture from your grievances, didn't you, in this case?

A. No, because I think the advertising was improperly put in at the time. Advertising, as you indicated, the billboards and everything else, are all part and parcel of a campaign, not added on to any given campaign.

Mr. Nizer: May I have Mr. Sawyer's brief on comparisons?

By Mr. Nizer:

Q. I read to you from Mr. Sawyer's brief. "THE MOUNTAIN" —

(6527)

that is the picture?

A. Yes, sir.

Q. "This picture is withdrawn from comparison since advertising expenditures not available to plaintiff has now been supplied."

Do you stand by that?

A. I accept that.

Q. And you take back the answer you gave a moment ago?

A. Yes, sir.

Mr. Sawyer: Now ask the witness if he ever saw that brief.

Of course, that is only fair, Your Honor, the implication being that the witness is uninformed about the brief. It has been withdrawn by counsel, that is fair enough, but I don't think the implication should stand that the witness has somehow, you know, falsified.

Mr. Nizer: Suppose you ask him on redirect if you wish to ask him that.

Mr. Sawyer: I think this impression should be corrected at this time.

The Court: Mr. Nizer is certainly entitled to ask this witness if there is any difference between your position and his position.

Mr. Sawyer: That is all right.

(6528)

The Court: As to whether he takes back his own.

Mr. Sawyer: Just as long as there is no indication that the witness would see a brief like this, which we filed, Your Honor.

The Court: I understand that.

By Mr. Nizer:

Q. And GENTLEMEN MARRY BRUNETTES, another picture that was eliminated by you from this case when the comparisons were being made is nevertheless included there too, isn't it?

A. Yes, sir.

Q. And you eliminated that picture as a grievance which you had, didn't you?

A. I don't recall, sir. If it is part of the brief I will accept counsel's decision.

• • •

(6529)

Q. GENTLEMEN MARRY BRUNETTES—I am reading from counsel's statement—"This comparison was eliminated by Mr. Wren."

Did you eliminate it?

A. If counsel says I eliminated it, I eliminated it, sir.

Q. And you don't want me to read the testimony in which you did so. That is unnecessary?

A. I agree with counsel, sir.

Q. But even though you knew that, that you had eliminated it—

A. I did not know it, sir.

Q. Well, you included that particular gross receipts in column 1 and—withdrawn.

Did you not review column 1 as recently as a week ago when you decided to add the Stanton Theatre which was not on that schedule?

A. The Stanton Theatre gross, sir, was added by counsel.

Q. With your consent and approval?

A. Yes, sir.

Q. Now, at that time did you review the figures when you were amending this chart to add the Stanton Theatre?

A. No, sir. I told you I haven't seen those figures in a couple of years.

(6530)

Q. AMBASSADOR'S DAUGHTER, that was a picture you have conceded is withdrawn from any grievance but you put in the $33,000 gross of that into your column 1, didn't you?

A. If it played one of the defendant theatres it is there, yes, sir.

Q. My first question—I should have broken it up—is that you concede you have no grievance on that picture?

A. I don't recall. If that is what is indicated, sir, that's right.

Q. Well, "if" doesn't help me on that. Then I have to prove it to you. You either admit it or I will have to prove it to you.

A. I would like you to prove it to me, sir.

Q. All right. In a heading—I won't read it because it is a brief, I don't want to read the whole thing—this is your counsel's brief, this is the case against United Artists. See if he even mentions that picture.

(Document is handed to the witness.)

A. Now may I have your question again, sir?

Q. By reading that—I don't want to read it out loud—by reading that doesn't it indicate that your counsel didn't even mention this picture as a grievance?

Mr. Sawyer: Your Honor, this business of briefs—Your Honor, we have written some 25 trial briefs. I don't even

(6531)

know what brief it is. We write briefs—

Mr. Nizer: On this matter.

Mr. Sawyer: —3:00 o'clock in the morning. These people don't see them.

Where is there anything about this picture in here?

Mr. Nizer: It isn't. That is my point.

Mr. Sawyer: Your Honor, how can counsel possibly ask this witness about a statement made to Your Honor in the course of a legal argument and draw some conclusion from it by the fact that counsel—why, we could be arguing points of evidence in which we refer to United Artists—

The Court: Yes, but I think, Mr. Sawyer, any statement that you as counsel for the Viking make in your brief, whether you make a statement now and it is recorded or whether you make a statement in a brief, could be used as an admission.

Mr. Sawyer: There is never a reference to this picture. It is not even referred to in here.

The Court: Let me read it.

(Document is handed to the Court.)

Mr. Nizer: Of course, it wasn't. That is my point. This was supposed to state the case against United

(6532)

Artists.

Mr. Sawyer: Suppose in the exigencies of writing a brief at 3:00 o'clock in the morning, with nine thousand pages of testimony, counsel overlooked it, in a brief addressed to Your Honor, does that bind the witness that something is withdrawn?

Mr. Nizer: Well, I am not depending on that. I showed you all the testimony. I thought he would concede if you didn't mention it.

Do you claim there is a grievance on that Mr. Sawyer?

Mr. Sawyer: What is the name of this?

Mr. Nizer: AMBASSADOR'S DAUGHTER. I thought I mentioned it to you.

Mr. Sawyer: I don't have an index. If Your Honor please, I would have to go through and find out whether there is still a grievance on that in the 87.

Did we state here in this very short summary to His Honor on a point which has now been argued sometime since and decided, a specific thing about it? The answer is no. And I thought it proves nothing and—

Mr. Nizer: No, that isn't it. Will you please read the topic?

(6533)

Mr. Sawyer: I don't remember a case in which they seek to use counsel's trial brief, hastily prepared, on specific points to confront a witness with something that is supposed to have been an admission. I think that is objectionable and I object to it. Now, whether that has been withdrawn or not, the record will show; and if the record so shows, it so shows, and if it doesn't, it doesn't, and nothing in here—

The Court: Why doesn't it show this, Mr. Sawyer? In other words, you were asked by me to say what there was in this case against United Artists and what you expected to prove as to United Artists. You wrote that and you did not include this picture.

He has merely asked whether—

The Witness: This is the first time I have seen it.

The Court: Of course, it is the first time he has seen it.

Mr. Sawyer: I am amazed, Your Honor. He has never seen this.

Suppose it reflects on counsel's diligence.

The Court: You will agree then that it is not mentioned in there?

(6534)

Mr. Sawyer: Certainly I will agree to that.

The Court: Very Well.

Mr. Sawyer: But I say the record speaks for itself, not whether counsel is not diligent enough to find everything in the record.

Does it mean, if I may pursue this for a minute, Your Honor, that every time we have a trial brief filed and Your Honor says, now, will you tell me this or will you argue this point, that counsel, if he inadvertently doesn't put something in—I don't mean he makes a statement—that he doesn't notice it, we don't get the whole thing in, that the party, the witness is therefore to be confronted with that, and that that is left out? Is that the way that is to be proved when the record speaks for itself?

Mr. Nizer: Mr. Sawyer overlooks the entire point.

Mr. Sawyer: After all, we have some consideration for Your Honor. There are times when counsel summarizes, there are times when counsel condenses, there are times when counsel picks out highlights and doesn't try to put in every last thing down there; there are times when counsel being tired doesn't find something at page 365. That is the point I think that the record speaks.

If he wants to cross-examine this witness, let

(6535)

him take the record and show it. This shorthand kind of short-cut I don't think is proper, Your Honor. I don't think it should bind this witness.

The Court: You mention other pictures there but you don't mention this picture. Now, can't the jury

consider it an inference that you have no complaint because that is your case against United Artists? If you had any complaint about this picture you certainly would have had it in there.

Now you say, "Well, maybe I do have a complaint but I have forgotten it, I have overlooked it. I didn't see it because of—"

Mr. Sawyer: That may be a reason.

The Court: But that is merely an explanation.

Mr. Sawyer: It is the kind of explanation, Your Honor, which is so obviously likely to happen that this kind of thing should not be used to confront or impeach or cross-examine a witness. Use the record.

The Court: I have already decided that. He is not being asked any questions concerning it because you admit that it is not in that page.

Mr. Sawyer: All I admit is that it is not in the page. I don't admit that there is no grievance on it.

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(6540)

By Mr. Nizer:

Q. Now in addition to the grosses of pictures which were not distributed by defendants, and in addition to the grosses of pictures which the Viking concedes were properly awarded to the defendant exhibitors, which you have included there—you have told us that, haven't you?

A. Yes, sir.

Q. In addition to that, this schedule also includes the grosses of pictures which the Viking ignored completely and had no interest in at all which played at these other theatres, doesn't it?

A. Yes, sir.

Q. Take, for example, MOBY DICK. You made no offer on that picture at all, did you?

A. No, sir.

Q. No interest in it at all. But you have included $105,-632 in the gross on that picture, haven't you?

A. If that was the gross plus the film rental, sir.

Q. By plus you mean $55,000 that you took off from the gross to get to column 3?

A. That's right.

Q. But once you put in $105,000 and you take off $55,-000, that puts into this column $100,000 more, doesn't it, in column 3?

(6541)

A. May I have that again, sir? You took off $55,000—

Q. $105,000, and what was the film—$55,000—$45,000, it put $45,000 more in column 3 in round figures, doesn't it?

A. Yes, sir, in round figures.

Q. And that increases this in some proportion, which we won't mathematically attempt now to do, that increases this conclusion, doesn't it? Each time you put a figure in column 1 and subtract the film rental that nevertheless raises this amount, doesn't it, in column 3?

Mr. Sawyer: Objected to, Your Honor, as not mathematically correct.

Mr. Nizer: Let the witness say.

By Mr. Nizer:

Q. Isn't it? Do you want to take your counsel's statement?

The Witness: Which is in column 3, sir?

By Mr. Nizer:

Q. Well, if you put in—let's suppose for round purposes that you put in a million dollars more.

A. Yes, sir.

Q. Here. In other words, suppose this was $771,000 but you put in a million to test it out.

A. Right, sir.

Q. And suppose that out of that $1,400,000 was film rental

(6542)

and you took that off, the extra million—

A. Took it away from the gross, subtracted it from the gross.

Q. Then you would have $600,000 more in this column (indicating).

A. That's right. That is what they would have left after deducting.

Q. Yes. And then in the total of this that $600,000 is represented in this total in column 3; is that right?

A. That's right, sir.

Q. And then when you divide it by seven it still is represented—

A. One-seventh of it is in there, yes, sir.

Q. Is still in there?

A. Yes.

Q. And then when you subtract what the Viking is, you get a larger figure in subtracting this from this in the third column, these last two figures, than you would if that million dollars had not been put in, don't you? You get a larger sum than you claim?

A. If the million is not put in, I get a larger sum—

Q. If it had not been there the figure would be less. If the million is there the figure is larger?

A. Yes, sir.

(6543)

Mr. Sawyer: Objected to, Your Honor.

The Witness: After the steps are taken, sir.

By Mr. Nizer:

Q. After the steps are taken, which I am assuming all the time.

A. Based on that assumption, yes, sir.

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(6550)

THIRTY-SEVENTH DAY

(6552)

JAY WREN, recalled.

CROSS-EXAMINATION (Continued)

The Court: Proceed.

Mr. Sawyer: Your Honor, I was asked yesterday by Mr. Nizer for certain records, original data records, from which the figures hereon were compiled and which I have here.

For the Goldman Theatres the plaintiff has no original records from which Schedule A was derived, because it happened that previous counsel went to the Goldman office by agreement with counsel, and there, by collaboration with a Mrs. Whipp, secretary or bookkeeper, I am not sure which, made excerpts from Goldman records, and we have them here for the three theatres as he took them from those records, and they have been agreed upon.

Now, by letter dated May 3, 1961, Mr. Rome is requested to produce in court the original records of weekly grosses and film rentals for the Randolph, Midtown, and Goldman, and, therefore, if Mr. Nizer wants the original records, I would assume he can get them from Mr. Rome.

On Stanley Warner we have, first of all, these records, which are photostats. They are Stanley Warner records and they are photostats of—what would you call those?

(6553)

I would call them bookkeeper's sheets. They are all Stanley Warner's theatres, showing films, play dates,

grosses, box-office receipts, number of days run, film rental, the percentage, and the profit or loss.

Then we have, and also used, P&L statements which were furnished to us, and we have photostats of, by Stanley Company, and for certain years, since they comprise, the figures were just derived from those, because the whole year was there in terms of gross and film rental.

Then we have cut-off cards, of course, which were also supplied by Stanley Warner for this period.

These are our photostatic copies of what we got from Stanley Warner.

On Fox we had the cut-off cards from Twentieth Century-Fox that they supplied us; Fox P&L statements; and a group of papers that Fox Theatre calls settlement statements; I guess they correspond to cut-off cards. They are these photostats here which we obtained from Fox Philadelphia.

It was from that that the list was made. That I think comprises the original material from which these calculations were made.

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(6555)

Q. You say then, Mr. Wren, that the arithmetic on Schedule A comes from the documents which Mr. Sawyer just referred to?

A. Yes, sir.

Q. And nothing else?

A. No, sir.

Q. To your knowledge?

(6556)

A. No, sir.

Q. Have you done the checking which we asked you yesterday to do on whatever documents you had with respect to the questions I put to you?

A. Such as what, sir?

Q. Well, for example, I asked you whether you wouldn't check, I gave you the information.

You wrote them down, didn't you, sir? Do you want me to repeat them again? I will.

A. I want to see if I have them right, sir.

Q. Well, have you got the answers?

A. Column 1, you said it includes almost a million dollars worth of non-defendant film.

Q. That is right.

A. It comes to $898,000, according to our figures, sir.

Q. That is without RKO, the non-defendant. You didn't include RKO, of course. I presume you didn't. Did you?

A. No, sir.

Q. You say it is $898,000—

A. Yes.

Q. —that you put into Schedule A of pictures which do not belong to any of the defendants in this case?

A. Yes, sir.

Q. Did you also check the number of such pictures, for

(6557)

example, at the Stanley? You remember I gave you some individuals, to show you how many there were in one particular theatre?

A. In the Stanley Theatre there were eight.

Q. Oh, no, 43.

Mr. Sawyer: No, Stanton.

The Witness: The Stanley.

Mr. Nizer: Oh, Stanton.

The Witness: You said Stanley.

Mr. Nizer: I beg your pardon if I did.

By Mr. Nizer:

Q. The Stanton.

A. The Stanton Theatre there were 54, sir.

Q. 54. That is more than I had.

And you say at the Stanley Theatre 8?

A. Yes, sir.

Q. You gave me that?

A. Yes, sir.

Q. And at the Mastbaum?

A. 14, sir.

Q. And did the pictures that didn't belong to defendants, had no relationship with us, we didn't distribute them, didn't refuse you any, couldn't have, that went into Schedule A, but that played at the Mastbaum, in that one theatre, amount to

(6558)

roughly $300,000 in grosses?

A. $248,313.

Q. All right. I will take that. Over a quarter of a million dollars that you put in this Schedule A?

A. Less than a quarter of a million, sir, 248.

Q. I beg your pardon?

A. Less than a quarter of a million, 248.

Q. 248, I thought you said 258. I am sorry.

$248,000 goes into Schedule A at one theatre of pictures that don't belong to any of these defendants, right?

A. Yes, sir.

Q. Were there any other answers you had there to matters I asked you to check?

A. The Midtown, 4 pictures, sir.

Q. What was the amount of those?

A. $171,389.

Q. And that too is added into that schedule of pictures that the defendants had nothing to do with, right?

A. Yes, sir.

Q. And that you never had any interest in or sought?

A. Yes, sir.

Q. And I don't know whether you were to look this up and check it, but you will agree that, for example, at the Fox

(6559)

Philadelphia Theatre, just to take one picture, I think we agreed on this yesterday, $246,000 for THE KING AND I, that you put in there; didn't you?

A. I didn't check that gross. That is the one you gave me, sir, I wrote that down. $246,855.

• • •

Q. When we adjourned yesterday there was a colloquy about whether if money is added improperly, if these sums which we had talked about are put into Schedule A in column 1—if any of these figures we have mentioned, $829,000, a couple of hundred thousand dollars, two hundred and forty-eight, and other sums, are put into column 1, which they are—they have been put in, you admit that?

A. Yes.

Q. And after you deduct the film rental for those pictures,

(6560)

which you have done, doesn't that increase this figure? Not increase it, doesn't that reflect itself in the six million dollars which is in Column 3?

A. Depending of course on the film rentals.

To illustrate my point—

Q. Well, I deducted the film rental.

A. Yes, sir, to illustrate my point, sir—

Q. Yes, but before you say anything, just follow me on this first, and then if you want to make an explanation I will permit you, but I am trying to simplify this according to my wishes.

You have taken your film rental for this, let us say that $829,000 that you put in here of non-defendant pictures.

A. Yes, sir.

Q. You have $829,000 in this column 1, and you have taken the film rental, the actual film rental paid on those pictures and put it into column 2, haven't you?

A. Yes, sir.

Q. So we are not dealing with "ifs", you have done it, haven't you?

A. Yes, sir.

Q. And that left large sums of various kinds in column 3?

A. That left the money they had left after paying film

(6561)

rental.

Q. Exactly, and there always was a large sum; if you take the film rental off, for example, it leaves a million dollars; if you take the film rental off $919,000 it always leaves a large sum and the film rental is always less than the gross, isn't it?

A. Yes, sir.

Q. Now, His Honor asked a question yesterday, in a colloquy with Mr. Sawyer, and I think you and me, as to whether it isn't a fact that if you put more money into column 1 the result here is larger?

A. Yes, sir.

Q. Each time you put more money; you say it isn't?

A. I wanted to explain that—

Q. Do you say it isn't?

Let us proceed by question and answer.

A. I say it isn't, with an explanation, sir.

Q. All right, then, then hold your explanation for one minute so that I can proceed.

Let me give you a simple test: Suppose that you had $100 here that doesn't belong here, let us say, but suppose you put in $100, and suppose the film rental was—

A. $130.

(6562)

Q. Oh, you mean if the film rental—

A. Yes.

Q. —is more than the gross?

A. Yes.

Q. All right.

Now, can you tell me in the history of this case a single instance in which the film rental paid to the distributor was more than the gross receipts at the boxoffice? Can you mention one?

A. No, sir.

Q. So therefore we are dealing with 100 per cent of instances in which the film rental was less than the gross, aren't we?

A. But in a bidding situation it could be highe., sir. That is what I tried to mention.

Q. I am not asking what it could be. We are dealing with 100 per cent of instances in which the film rental was less than the gross, aren't we?

A. One second, please.

Yes, sir.

Q. Therefore, so far as this case is concerned, answering His Honor's question, if you put more money into the column 1 you will get a higher figure down here in column 3, won't you, in this case?

(6563)

A. Yes, sir.

Q. And the only time there would be any exception to that is the extraordinary situation where you take in $500 at the boxoffice and you have to give $600 to the distributor?

A. Yes, sir.

Q. Of course, that never happened, did it? It never happened in this case in over two and a half years; you have already told me that, haven't you?

A. Yes, sir.

• • •

(6564)

Q. Assuming then that the $829,000, Mr. Wren—were to be taken out of this column 1, that is, for non-defendant pictures, you gave me that figure.

A. No, I did not give you that figure. I gave you $898,000.

Q. All right, let us call it $900,000 for round figures. Is that all right?

A. Yes, sir.

Q. Just that one item alone.

A. Yes, sir.

Q. All right. Suppose that the $900,000 was taken out and that you took off the film rental for that $900,000 and you used the same procedure which you have done here, this figure, of course, would be less, wouldn't it? We don't know how much less.

A. Yes, sir.

Q. But it would be less, wouldn't it?

A. Yes, sir.

Q. The result would be less, wouldn't it?

A. Yes, sir.

(6565)

Q. Now, you have told us about the pictures not distributed by defendants which are in there; you have told us of pictures which you have conceded are out of this case, but you put the grosses in there, you have told us that. That amounts to hundreds of thousands of dollars, doesn't it?

A. Yes, sir.

Q. Now, I ask you for another category that you put in Schedule 1. Have you not also included grosses in column 1 where the Viking did not seek the picture at all? Of the defendants now, I am talking of the defendants. Where the Viking did not seek the picture, never tried to get it, but then you took the gross of that picture at another theatre and still put it in there, didn't you?

A. Yes, sir.

Q. Now, of course, you have no grievance that pictures that you passed up played at your opposition theatre, no matter whose theatre it was, have you?

A. No, sir.

Q. And even though you have no grievance because you passed up the picture and it turns up at some theatre, you have, nevertheless, put down those amounts, those grosses at the other theatre, into Schedule A, for computing what you call your damages, haven't you?

A. Yes, sir.

(6566)

Q. Now, let us see whether those sums are substantial, just go through a few illustrations.

Let us take the Warner picture MOBY DICK. You made no offer for that picture, did you?

A. No, sir.

Q. You had no interest in that picture?

A. No, sir.

• • •

Q. $105,000 gross, you say you did put it in; did I ask you that yesterday?

A. Yes, sir.

Q. Very well. Now, let me sum up on this then, without

(6567)

giving you an illustration.

We will agree, I am sure, without going to the list and counting them, that Warner distributed 48 pictures.

A. When, sir?

Q. During the period of this suit. 48. And that you made an effort for or sought, let us say, 9.

I have the numbers, but I think you will accept that, won't you, Mr. Wren?

A. Subject to check, yes, sir.

Q. Have you—

A. I say subject to check, yes, sir.

Q. All right. I didn't hear you. Excuse me.

Now, you ignored then—on those pictures you ignored and did not seek—

Mr. Sawyer: We do not agree with the figure, I am sorry, Your Honor. We do not agree.

Mr. Nizer: What is the figure you give me?

Mr. Sawyer: The figure of 9 is those on which we made a written bid. There were other pictures which we sought.

Mr. Nizer: I do not think that is a fact, but for the present let us just assume those that you made offers on, oral or written offers on.

(6568)

Mr. Sawyer: No, the 9 are pictures on which we made a written bid.

Mr. Nizer: Written or oral.

Mr. Sawyer: There are other pictures which we sought in one fashion or another.

Mr. Nizer: I do not think that is in this case, Your Honor, but for the moment—

Mr. Sawyer: You asked me to agree. I just can't agree. I am sorry.

It is 9 on which we made a written bid and there are other motion pictures which we sought.

Mr. Nizer: Well, in order not to get back to that—I will come back to that I think, and we will see if we are not right, but let us go on at this moment. I will not stop to calculate.

By Mr. Nizer:

Q. Take THE SEVEN YEAR ITCH. Whose picture was that?

A. Twentieth Century-Fox, sir.

Q. And that is the case where you didn't make any effort at all to obtain the picture, did you? That is with Marilyn Monroe, do you remember the picture?

A. Yes, I remember the picture and the cast. I am not sure whether we did or not, sir.

Mr. Nizer: Give me 2223, please.

(6569)

By Mr. Nizer:

Q. Page 2223, see if this refreshes your recollection:

"Q. Fox played in this territory, which you did not make any effort to obtain by bid, negotiation or otherwise, there were THE SEVEN YEAR ITCH with Marilyn Monroe and Tom Elwell. Do you recall that picture?

"A. Yes, sir.

"Q. And if you look at your list of national film rental, that is a $4,879,000 picture, isn't it, a very successful picture?

"A. I would say so, yes, sir, very successful.

"Q. And among those that you showed no interest in A MAN CALLED PETER—"

That is another picture that we are going on, and I will come to that in a minute.

So does that refresh your recollection that you showed no interest in that? You did not make any effort to obtain it by bid, negotiation or otherwise. SEVEN YEAR ITCH, with Marilyn Monroe. Will you acknowledge that now?

A. Yes, sir.

Mr. Sawyer: He doesn't answer it. You read it. I didn't hear him say that, that he would agree with that, with what you read, Mr. Nizer.

The Witness: Did I answer yes to it?

(6570)

Mr. Nizer: Yes, you did: Yes, sir.

By Mr. Nizer:

Q. Let me read it again to you:

"Q. I beg your pardon—"

This is the way the question starts,

"I beg your pardon," because you were asking me about another company.

"Q. Fox played in this territory, which you did not make any effort to obtain by bid, negotiation or otherwise, there was THE SEVEN YEAR ITCH, with Marilyn Monroe and Tom Elwell. Do you recall that picture?

"A. Yes, sir."

A. I recall the picture.

Q. You mean that you didn't make an effort? You misunderstood that question?

A. I don't recall, sir.

Q. I beg your pardon?

A. I don't recall whether we bid on the picture or not.

(6571)

By Mr. Nizer:

Q. Look up your records and tell me if you ever made any offer.

A. I will check the records, yes, sir.

Q. What is that?

A. I will check the records, yes, sir.

Q. Can you do it now? Have you got a record on which you can tell?

Mr. Nizer: Mr. Steinberg, will you see if you have any offer on that picture of any kind?

Mr. Sawyer: We find no bid here. I don't know anything else about the picture. Whether there was

anything else done by the Viking in connection with it, I do not know.

Mr. Young: I submit that is not an answer.

Mr. Sawyer: We have no written bid for the picture.

Mr. Young: And he didn't make an offer on it either.

The Witness: If there is no record of a written bid, we did not bid on it, sir.

By Mr. Nizer:

Q. Do you recall making any offer of any other kind?

A. No, sir, I do not.

(6572)

Q. Were you invited to bid on that picture? You were invited to bid.

A. I would assume, yes.

Q. And you didn't make any, did you?

A. I told you we did not bid on it.

Q. We have to go back on that. Will you now accept that this was a picture on which you made no bid or offer of any kind? Will you accept that now?

A. Yes, sir.

Q. The gross of that picture which played at the Fox Philadelphia was $83,000 and some odd dollars. You put that in there nevertheless, haven't you, in Schedule 1?

A. If that is what the gross is it is in there, yes, sir.

Q. Now, the COURT MARTIAL OF BILLY MITCHELL with Gary Cooper. There is a Warner picture. THE COURT MARTIAL OF BILLY MITCHELL with Gary Cooper in it as the star. Now, you didn't submit any offer on that picture, did you?

A. I don't believe we did.

Q. Well, "don't believe—" let's see. If we have to do it this way we will.

Mr. Goffman: I believe the evidence is clear in the record that he did not.

Mr. Sawyer: That is an interesting reflection.

Mr. Nizer: Let me prove it to him.

(6573)

By Mr. Nizer:

Q. Didn't you testify that you sent a telegram in that case that you are unable to submit an offer due to a prior commitment? Does that come back to you now?

A. No, sir, it does not. But if we sent a wire that is probably what happened.

Q. Probably?

A. Yes, sir.

Mr. Nizer: I am sorry, Your Honor. May I have a moment, please? I regret—there is one citation that I had here.

Until we find that I will go on. I have a citation but apparently a wrong number in my notes.

By Mr. Nizer:

Q. A MAN CALLED PETER. Hadn't you testified that you didn't seek that?

A. I don't believe we bid on that at all, sir.

Q. It was 2334 and I had 2234. All right.

Now, coming back to THE COURT MARTIAL OF BILLY MITCHELL. Here is the telegram, it was read into the record—December 5, 1955—Mr. Goffman read it:

Due to a prior commitment the Viking Theatre is unable to submit an offer for a license to exhibit first-run Philadelphia the motion picture COURT MARTIAL

(6574)

OF BILLY MITCHELL which you advise is available such a date.

A. Right, sir.

Q. There is no more doubt about it, you didn't offer, you didn't have a date available and you didn't seek the picture, right?

A. So it says, sir; yes, sir.

Q. When you say "So it says," that is yuor telegram?

A. Yes, sir.

Q. And you have included some 40-odd thousand dollars in Schedule 1 on that picture which you didn't even seek, haven't you?

A. If that is the gross, we included it in there.

Q. Yes, I give you the gross and if you want to check it you may.

Now, A MAN CALLED PETER—I will give you the gross on that. You included $50,000 on that, round figures, in Schedule A even though you didn't seek that picture; correct?

A. Yes, sir,

Q. LOVE IS A MANY SPLENDORED THING, the same thing. You didn't seek that picture, you so testified, didn't you?

A. I think that's right, sir.

Q. And you included nevertheless $119,539 in Schedule A

(6575)

even though you didn't even try to get the picture, you put in that for purposes of damages, didn't you—$119,000?

A. That is what the gross was, yes, sir.

Q. Yes, you can accept that because you will have a chance, your counsel is checking.

And RAINS OF RANCHIPUR, another picture with Lana Turner, you put in over $59,000 in Schedule A even though you didn't seek the picture, didn't you? That is another such case.

A. Yes, if that is the gross, yes, sir.

Q. And to be brief I will just read off a whole series of pictures of that kind. DADDY LONG LEGS with Fred Astaire, over $50,000; you put that in and you didn't seek the picture, did you?

A. Right, sir.

Q. SOLDIERS OF FORTUNE with Clark Gable, over $54,000. You didn't seek the picture but you put it in in Schedule 1 for damages, didn't you?

A. Yes, sir.

Q. LIEUTENANT WORE SKIRTS with Cary Grant, over $28,000 almost $29,000; you put that in and you didn't seek the picture, did you?

A. Yes, sir.

Q. And MAMIE STOVER with Jane Russell, and GOOD MORNING

(6576)

MISS DOVE, and others, hundreds of thousands of dollars of these grosses have gone into Schedule 1 and you didn't even seek the picture, did you, in Column 1, and you didn't seek the picture?

A. If that is what was testified, yes.

Q. As a matter of fact, of the 57 pictures within the 87—withdrawn within the 87, it will confuse it. There were 57 Fox pictures released for first run during the period in suit—you can take that and check it—and you ignored 42 pictures or 73 per cent. Does that make 73 per cent? I am giving it to you now in percentage.

A. If we passed up 18 pictures out of 57?

Q. 42, you ignored 42 out of 57. This is of Twentieth Century-Fox pictures. That is 73 per cent. Will you accept that figure while you are checking it or check it. Go ahead. 73 per cent, is that right?

A. How many per cent, sir?

Q. 73. 42 out of 57, 73 per cent, isn't it?

A. Yes, sir.

Q. All right. And of the 73 per cent that you ignored of those Twentieth Century-Fox pictures, you put the whole 73 per cent in and all the hundreds of thousands of dollars of grosses into Column 1 of Schedule A, did you not?

A. Yes, sir.

(6577)

Q. Now let's take a look at some Paramounts.

You ignored pictures there, too, did you not?

A. Yes, sir.

Q. Dean Martin and Jerry Lewis picture PARDNERS; LITTLE FO' S with Bob Hope—SEVEN LITTLE FOYS with Bob Ho[illegible], you ignored that, didn't you?

A. Yes, sir.

Q. You didn't try to get it.

NEVER TOO YOUNG with Martin-Lewis; you didn't try to get that, did you? Do you recall that one?

A. Yes, sir.

Q. I mean when you recall it, I don't want the kind of answer, please, that I got today. I don't mean just do you recall it. Is it a fact, do you recall that you ignored that picture and didn't try to get it? You understand my question?

A. Yes, sir.

Q. ARTISTS AND MODELS, Martin and Lewis; you ignored that, didn't you?

A. Yes, sir.

Q. And there are other—withdrawn for a moment.

Now, without reading off each of the grosses, those amount certainly to several hundred thousands of dollars of grosses of Paramount pictures, don't they?

A. Those three several hundred thousand?

(6578)

Q. Several hundred I said.

A. Those three pictures, sir?

Q. There are more. There are four, there are many more than four. If you want to I will give you the figures.

PARDNERS $25,000—take it down—almost 26; SEVEN LITTLE FOYS $55,000 in round figures; NEVER TOO YOUNG $24,000 in round figures; ARTISTS AND MODELS about $45,000 in round figures. What is that equal to if I stop there? Those are the ones that I mentioned so far. About $150,000?

A. $149,000.

Q. So that you have got another $149,000 in Column 1 of Paramount pictures that played at these defendants' theatres that you ignored and didn't try to get, correct?

A. Yes, sir.

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(6580)

Q. Now, there were a number of important Paramount pictures which you did bid or negotiate for but which were awarded to other than defendant theatres. For example, REAR WINDOW, that was a very important picture with what stars?

A. James Stewart and Grace Kelly.

Q. Grace Kelly?

A. Yes.

Q. And you tried to get that picture but it was awarded not to Stanley or to Goldman. To whom was it awarded?

A. I believe it played the Arcadia.

Q. Arcadia. And then there is CATCH A THIEF.

A. Trans-Lux.

Q. With Cary Grant, isn't it?

A. Yes, sir.

Q. A very important picture with a large gross. And that you lost but not to the defendants. You lost it to whom?

A. The Trans-Lux, sir, I have said.

Q. And then ROSE TATTOO, that was an important picture, wasn't it?

A. Yes, sir; Burt Lancaster.

Q. And who did that go to?

(6581)

A. Either the Trans-Lux or the Arcadia, sir.

Q. Now, there are a number of those, I have just given you a few illustrations, where because you were outbid or outnegotiated by other than defendant theatres you did not get those pictures and didn't get those grosses, correct?

A. Yes, sir.

Q. And, of course, there you have no grievance that the defendants got them because somebody else got them, right?

A. Yes, sir.

Q. Nevertheless those two grosses are not in your lower column where you have the Viking here of a million two and you are subtracting this lesser sum, as you put it, from this sum in order to get this final figure of $391,000. This lower figure of the Viking now, taking the Viking gross, had you obtained those pictures by bidding for them larger sums and outbidding your competitors, you would have had a larger sum here, would you not?

A. Not necessarily. I don't know what they would have grossed.

Q. Well, they would have grossed something, wouldn't they?

A. But in this particular period—

Q. Answer my question.

Mr. Sawyer: Let him finish.

(6582)

By Mr. Nizer:

Q. Answer my question first. They would have grossed something, first, that is the question.

The Court: Let him answer the question.

The Witness: Yes, sir, they would have grossed something but I would have had to take out something that was in there to play the other pictures, so it may be less.

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(6583)

Q. But certainly with pictures of the kind that we have mentioned, REAR WINDOW and CATCH A THIEF with Cary Grant and Grace Kelly and Burt Lancaster, you don't mean to say that had you obtained those pictures that you wouldn't have had in the third column a higher figure, would you?

A. You told me I couldn't play CATCH A THIEF because I was playing STRANGER, sir.

Mr. Nizer: I move to strike that out, Your Honor, as not responsive.

The Court: Granted.

By Mr. Nizer:

Q. Will you please answer my question. Had you played any of these pictures, your amount in the third column for the Viking would have been higher, wouldn't it?

A. I won't agree to that, sir.

Q. All right, I won't press it.

Mr. Sawyer: Also I move to strike any reference to REAR WINDOW since the evidence is that the Viking did not bid on it. It was before Mr. Wren's time and he apparently did not know that. Therefore, I move to strike the entire reference to it. That removes it from any consideration

(6584)

in this case whatsoever. It didn't play any of these theatres and we didn't go after the pictures so what does it have to do with this case? Nothing.

Mr. Nizer: Mr. Sawyer, that isn't so. My argument is—just a moment, sir.

The Court: What is your theory of relevancy?

Mr. Nizer: May I, please, Your Honor?

Yes. My position is that you have an upper, above the line and a below-the-line calculation here. Above the line are the defendants' theatres and below the line is the plaintiff theatre. I am first addressing myself to the above-the-line to show hundreds of thousands—I will come to a conclusion that it will run in millions of dollars put in there that we say do not belong in that; that it is a completely false tabulation. But I am also indicating that through no fault of any of the defendants, either theatres or distributors, had this man been a better theatre operator with better judgment and been able to bid the right amount so to take pictures which others got—can't blame Stanley or Goldman on this; the Arcadia got it, the Trans-Lux got it—that he would have had a higher gross and, therefore, that the third column would not be as it is, and we are not to be charged for his failure to operate skillfully, on the

(6585)

theory, Your Honor, that we have submitted as a matter of law that one of the items in whether there is comparability is the skill of the operator. And I will demonstrate a little further on that Mr. Wren has conceded that he made terrible errors in not going for pictures—and I will accept Mr. Sawyer's word that he didn't go for REAR WINDOW if he tells me that, but that is a mistake, not to go for a REAR WINDOW picture which has in this city Grace Kelly, a Hitchcock picture—with Burt Lancaster, is it?

The Witness: No, it was not with Burt Lancaster.

Mr. Nizer: With Jimmy Stewart.

The Witness: Yes, sir.

Mr. Nizer: Not to bid for that and to have the judgment to bid for something else is something that he is responsible for and he cannot charge us with it and that is why the figure below the line is more depressed than it should be.

The Court: You mean that if he had successfully bid for one of these pictures—

Mr. Nizer: That's right.

The Court: That it would have grossed—he would have gotten it—it would have grossed more than the picture that he actually played; is that it?

(6585a)

Mr. Nizer: Well, it is a matter of clear inference because these are pictures which made $154,000 gross, for example, at a smaller theatre. These pictures were not—he wasn't outbid by the defendants. The Trans-Lux which has 600—

Mr. Sawyer: He didn't go after the picture.

(6586)

Mr. Nizer: He didn't go after them. That is just as bad. I will take it either way.

Mr. Sawyer. Oh--

Mr. Nizer: If he had no interest—wait, Mr. Sawyer—if he had no interest in the picture when he should have an interest, if he were a good showman, that is a fact for the—for Your Honor to consider. If he has an interest but he doesn't outbid a theatre half his size, that it has nothing to do with the defendants, that is a fact that I have a right to put into this case, but I am through with this.

Mr. Sawyer: Well, whether or not he is through with it, but Your Honor, if there is any peripheral tangential indirect relevancy to whether or not the new area of the case—I must say that he would show that Mr. Wren—or, Mr. Wren wasn't even there—was not a canny operator because he could point out some pictures that he didn't bid for, and that they are not even pictures that played at the defendant theatres, that still in all has nothing to do with the cross-examination of this schedule. A motion picture that doesn't come into the case has absolutely nothing to do with it. We never went after it, didn't play any of these theatres,—

Mr. Nizer: It has to do with the gross which—

Mr. Sawyer: —and the gross which isn't in

(6587)

there either way, and now I move to strike it as to the REAR WINDOW.

The Court: Proceed.

Mr. Nizer: Thank you, sir.

By Mr. Nizer:

Q. Now, in the case of Paramount there were 38 Paramount pictures released during the period of suit first-run in Philadelphia and you ignored 25?

A. How many did we seek, sir?

Q. You ignored 25 and, therefore, allowing for 3 that went to Arcadia and 5 to Trans-Lux—you can take it down if you want to make a computation—in other words, to non-defendant theatres—you ignored 66 per cent—I am putting it in percentage terms—you ignored 66 per cent of the Paramount pictures, but those—is that correct, first? Will you accept that?

A. You are taking out 8 pictures?

Q. Yes, 3 to Arcadia, you see, and 5 to Trans-Lux of those Paramount pictures.

A. 66 per cent; yes, sir.

Q. That is right; correct?

A. Of the 30 pictures; yes, sir.

Q. Yes; and even though you ignored 66 per cent, you took the grosses of those 66 per cent and put them right into

(6588)

column 1 of Schedule A; correct?

A. We said that; yes, sir.

Q. Well, do you say it now?

A. Yes, sir.

Q. Now, taking United Artists for a moment. That KENTUCKIAN with Burt Lancaster, you didn't make any offer or bid for that at all, did you?

A. No, sir.

Q. But you have, neverthless, included a gross of some $27,000 in Schedule A, haven't you?

A. Yes, sir, if that is what the gross was.

Q. INDIAN FIGHTER with Kirk Douglas, the same thing; you ignored it but you put up $40,000 in Schedule 1 of that United Artists picture, didn't you?

A. If that is what the gross was; yes, sir.

Q. Yes. I represent it to you. You can check it. MAN WITH A GUN, you ignored it, but you put it in the gross, into that schedule, didn't you?

A. Yes, sir.

Q. JOHNNIE CONCHO with Frank Sinatra, you ignored it, but you put in some $24,000 gross of that United Artists picture—

A. Yes, sir.

Q. —in Schedule 1, in Schedule A. Let us abbreviate this.

(6589)

I won't give you more illustrations. There were 55 first-run United Artists pictures during the period of this litigation

and you ignored 38 or 69 per cent; will you agree with that figure in percentage?

Incidentally, in making that percentage, it will help you to know that two pictures, TRAPEZE went to the Trans-Lux and MARTY went to the Studio. In other words, two of those—

A. Two pictures? TRAPEZE?

Q. I say TRAPEZE and MARTY.

A. MARTY didn't go to the Trans-Lux, sir.

Q. Studio, I said.

A. Yes, sir.

Q. That is one of the competitors that has 450 seats, isn't it? Was it?

A. No, sir.

Q. What is it? How many?

A. 378 seats.

Q. How many?

A. 378 seats.

Q. All right. Well, if you take out those two, TRAPEZE and MARTY, which took two of those pictures—I am just giving you the facts so you won't be confused on your figures—you ignored 69 per cent of the United Artists pictures, didn't you?

(6590)

A. Yes, sir.

Q. But you have taken the grosses of that 69 per cent and put them in the schedule?

A. Yes, sir.

Q. Now, in the case of Loew's, MGM, for almost a year the Viking made no offer of any kind for any Loew picture; isn't that correct? We have been all through that. I just sum it up for the purpose of analyzing the schedule. That is correct, isn't it, that statement?

A. Yes, sir.

Q. And among those that you ignored, just to give a few illustrations and then I will give you a summary to save

time, among those you ignored was TENDER TRAP with Frank Sinatra, Debbie Reynolds, David Wayne; correct? You ignored it and you put in seventy-three thousand in round figures; $73,000 are reflected in that schedule of that picture; correct?

A. If that is what the gross was.

Q. Yes, at the Stanley Theatre. You ignored THE SWAN with Grace Kelly and Alec Guinness and Louis Jourdan, didn't you?

A. No, sir. We were asking for advertising—

Q. Just a moment, sir.

Mr. Nizer: 1616.

(6591)

By Mr. Nizer:

Q. I will read the question before it so you will see the context.

"Q. But you ignored TENDER TRAP for the reason you have given, that it had a $3,000,000 national film rental as it turned out; is that right?

"A. Yes.

"Q. And during that period that you were not negotiating or bidding for pictures, Loew's distributed THE SWAN, with Grace Kelly, Alex Guinness and Louis Jourdan.

"A. That is right, sir."

And then I asked you—

A. For the reasons I have given you, mentioned before, sir,—

Q. Yes.

A. —and I believe it referred to the fact that they would not supply us with advertising information.

Q. We have gone—if you want to review that, I will. There was a dispute you had with advertising and Mr. Sley, you testified, told you, "Stay away from them because we have this dispute," so in substance—

A. Until they clarified.
Q. Until they clarified it.
A. Yes, sir.

(6592)

Q. Whatever that dispute was, you voluntarily, Viking voluntarily, because of this controversy—and I won't review it again unless you compel me to—because of this controvery you voluntarily decided not to make an offer or to negotiate for any Loew picture?

Mr. Sawyer: Not because of the controversy. We have gone—

Mr. Nizer: No. I don't think you should answer that, Mr. Sawyer.

Mr. Sawyer: Because you keep saying that because of a dispute, and the witness keeps saying because they wouldn't clarify advertising things, and we go back and forth—

Mr. Nizer: I don't see—

Mr. Sawyer: —and now we have done it three or four times.

Mr. Nizer: I don't see the distinction.

By Mr. Nizer:
Q. Isn't that the dispute?

Mr. Sawyer: There is a distinction.

The Witness: No, sir. We were asking for information on a series of Metro pictures and they would not supply it to us.

(6593)

By Mr. Nizer:
Q. Let me read to you what you said previously about this.

"Q. So that we are agreed, are we not, that you decided that until they agreed with you about that dispute you were not interested in a single Loew's picture? You wouldn't bid or negotiate for it?

"A. I did not say that, sir. What I think I said was until such time as they advised us as to their advertising plans on the pictures being offered we were not interested in submitting offers."

That is correct, that answer?

A. Yes, sir.

Q. Therefore, the controversy was that you wanted them to advise you of what advertising plans they had and unless they did you would have nothing to do with them; correct?

A. Prior to the offer date.

Q. Yes, prior to, after, that was the controversy?

A. No, not after; prior to, sir.

Q. All right; whatever the detail of that was, because they wouldn't tell you what their advertising plan was, which you claim you should have had—

A. Yes, sir.

Q. —you voluntarily said, "I will not deal with you at all" and you stayed away for almost a year; isn't that the fact?

(6594)

A. That is right; . . .

• • •

(6596)

Q. I want to read one more question and answer on this, please.

"Now, because of that theory you were not interested in any of Loew's pictures for almost a year because they would not do that; is that right?

"A. That is right, sir."

The Witness: What theory, sir?

By Mr. Nizer:

Q. The one that you have just expressed,—

A. The advertising.

Q. —that they should have given you advertising.

A. Yes, sir.

Q. "And for at least ten months prior thereto you had failed to submit a bid or negotiate for a single

(6597)

Metro picture. Is that correct?

"A. That is right."

And then I asked you whether staying away from that road deprived you of other pictures, and that is the reason I do ask the question, didn't you testify that even though you didn't seek to get a Metro picture for almost a year, that didn't bother you; you got other pictures in place of Metros? Didn't you so testify?

A. That it didn't bother me—

Q. That is right.

A. —not having film?

Q. That it didn't bother you, yes. Didn't you so testify?

A. I may have said that; yes, sir.

Q. May have or did you?

A. I don't believe I said it in that way, sir.

Q. Question: 1619:

"Q. You found that staying away from one of the top major producers for ten months was getting a little costly, didn't you?

"A. No, sir.

"Q. It didn't bother you at all?

"A. No, sir."

Did you make those answers?

A. Yes, sir.

(6598)

Q. Now you will say you not only may have said it; you did say it, didn't you?

A. I said that, sir, with an explanation.

Q. Now, you didn't say it with an explanation at page 1619, did you?

A. I didn't say in there that they wouldn't let me bid on COBWEB, either.

Mr. Nizer: I move to strike that out as not responsive.

The Court: Motion is granted.

By Mr. Nizer:

Q. Now, sir, even though you didn't negotiate or bid for these Metro pictures for almost a year because of this dispute that you have told us about, you stayed away, you have, nevertheless, taken all of the grosses of those pictures which you did not try to get, didn't seek, and you have included all those grosses, in addition to all the other films I have mentioned, you have included all those grosses in Schedule A, haven't you?

A. Yes, sir.

Q. Isn't that right?

A. With an explanation. We did try to get them.

Mr. Nizer: I move to strike that out.

By Mr. Nizer:

(6599)

Q. My only question is, did you include all those grosses in Schedule A?

A. I said yes, with an explanation.

Q. And among those grosses is MEET ME IN LAS VEGAS, $62,000, you have poured into that schedule, haven't you?

A. Yes, sir.

Q. And I asked you at 1617:

"MEET ME IN LAS VEGAS with Cyd Charisse. That was a $2,200,000 picture. You did not attempt to bid or negotiate for that?

"A. No, sir."

That was a correct answer when you made it, was it?

A. No, sir, because I have said elsewhere—

Q. That was an incorrect answer?

Mr. Sawyer: Well, don't interrupt.

The Witness: I have said elsewhere, sir, that I even had to pay to screen for that picture out of my own pocket,—

By Mr. Nizer:

Q. No. My question—

A. —and it was the same thing again with advertising; they would not tell me what their advertising plans were so I could bid on the picture.

(6600)

Q. My question, sir, is, was that a correct answer when you gave it under oath previously at this trial?

A. Because—yes, sir, at that time, and there is other answers in there regarding the same pictures.

Q. Was this—I read it again and I ask you to answer calmly:

"MEET ME IN LAS VEGAS with Cyd Charisse. That was a $2,200,000 picture. You did not attempt to bid or negotiate for that?"

A. I was wrong. I did attempt.

Q. "A. No, sir."

Let me first read it.

Now, do you want to take back your answer given under oath at this trial?

A. Yes, sir, because given under oath there are other answers there pertaining to the same picture.

• • •

(6602)

Q. Let me see if I can summarize on Loew's. There were 57 MGM pictures first-run Philadelphia during this period of suit. You can check that.

A. 57 pictures from Loew's?

Q. Yes, sir.

A. Right, sir.

Q. Of those you ignored 38?

A. I won't agree to that, sir.

• • •

(6604)

Q. On the assumption that your testimony previously given about ignoring these pictures over this period of time is correct, I just ask you to check my percentage: 38 Loew pictures were ignored, which would be 66 per cent of the 57 released during this period; is that correct?

A. That is probably—yes, sir.

Q. And even though you ignored that 66 per cent on that assumption, the grosses of 66 per cent of the Loew's pictures distributed during the period of this litigation are all included in that column 1 of Schedule A; right?

A. Based on that assumption; yes, sir.

• • •

(6605)

Q. I was going to give some illustrations of Columbia pictures before making some grand totals of these, Mr. Wren.

A. Yes, sir.

Q. In the case of EDDIE DUCHIN STORY, that is a Columbia picture with one star.

A. Tyrone Power I believe, sir.

Q. Yes. You didn't want to obtain that picture, did you?

A. We didn't bid on it, no, sir.

Q. And you actually advised Columbia that you had some—well, you actually advised Columbia you didn't have any interest in it, you didn't want to bid on it; isn't that so, in answer to their invitation?

A. I believe that is right, yes, yes, sir.

Q. You actually sent a telegram in answer to their request that you bid or negotiate, you said: "The Viking Theatre does not wish to submit an offer."

Mr. Sawyer: Objected to, Your Honor. The witness has stated this. What does it prove to re-read sections of the record?

The Court: I agree with that.

By Mr. Nizer:

Q. My question—

(6606)

The Court: Sustained.

By Mr. Nizer:

Q. Although you did not have any interest in obtaining this picture you have taken the gross that was derived from this picture, when some other theatre that did have an interest in it played it.

A. Yes, sir.

Q. And you took $138,000 and poured it into that schedule, didn't you?

A. If that is what the gross was, yes, sir, it is in there.

Q. When you say "If," let us understand each other, that this is subject to check, and I am taking the basic records. So let us assume it is correct, unless you come back and tell me otherwise. I do not want any conditions imposed.

If you find that any of these figures are not right will you let us know tomorrow morning or through counsel?

A. Yes, sir.

Mr. Sawyer: Your Honor, if he is instructing the witness not to make that qualification then I object to that instruction, because the witness does not have the figure in front of him and says, it is right, yes, there would be little doubt that later on—I do not think that is

(6607)

true, but later on if there is some argument about how much the gross was on this picture, three weeks hence we would have the witness read to from his deposition and there would be an unqualified yes, and the witness would then have supposedly made some admissions.

So I think it is entirely proper for the witness to say, if that is what the gross is, yes.

Mr. Nizer: I am not objecting to the "if," Your Honor.

Mr. Sawyer: All right.

Mr. Nizer: I am suggesting as a matter of procedure that either that we wait while he checks it so that he can take away the "if," or to save time we will assume that the "if" means if you later find anything wrong you advise us, otherwise it stands.

I don't want to have you later say, I said if. In other words, it will be checked, and we will be advised.

We will assume it is correct unless we are advised by counsel.

Is that all right, Mr. Sawyer?

Mr. Sawyer: Well, no, it isn't all right. I don't—

Mr. Nizer: Then I am going to ask him—

(6608)

Mr. Sawyer: It isn't all right, Your Honor, because my objection stands to this entire line.

It is repetitious and it absolutely cross-examines the witness on something that he insists is true.

I do not know how he can cross-examine the witness on something that he asserts is a fact, that all grosses are included. This is beyond me and we have had a day and a half of it now.

The Court: I understand. Overruled.

Mr. Nizer: If counsel will not accept that stipulation, to save time that when you say "if," to which I have no objection, that you have a chance to check it, then the burden is on you at least to advise us that you disagree—

Mr. Sawyer: Oh, of course, we will accept that as a figure, yes.

Mr. Nizer: You will accept it?

Mr. Sawyer: Yes.

Mr. Nizer: All right. Otherwise I would like you to check it right now.

By Mr. Nizer:

Q. So we have passed this. This is $138,000 more that you put into Schedule 1 on a picture that you advised by telegram that you had no interest in; right?

(6609)

A. Yes, sir.

Q. Now, to save time, I will just read a group of pictures and ask if the same is not true—if the same isn't true with the seven pictures that you did not offer to negotiate for them or make a bid for them: MAN FROM LARAMIE?

A. Yes, sir.

Q. With James Stewart; and I will give you the gross, $48,656. You put that in there, didn't you?

A. If that is the gross it is in there, yes, sir.

Q. Now, Columbia released 70 pictures first run in Philadelphia during the period in suit.

A. 70 pictures, sir?

Q. Yes. And you made no offer or bid on 66 of these 70; correct? Will you accept that subject to your checking and advising me?

A. Subject to check, yes, sir.

Q. And that would be 95 per cent. Will you accept that percentage figure?

A. Yes, sir.

Q. But you have included that 95 per cent that you did not offer or negotiate for on Columbia pictures, and the grosses of all those 66 pictures, totaling well over half a million dollars, without trying to be precise, you have thrown that into Schedule 1, haven't you? Schedule A?

(6610)

A. If that is what it totals, yes.

Q. Yes. Well, you can check those figures on those pictures. You have the documents.

A. Depending on the pictures in the list that you have condensed, sir.

Q. That is right. Now, as to RKO do you recall that on the picture FIRST TRAVELING SALESLADY, after you said that you didn't have a chance to negotiate and so on, we showed you letters that came from your file?

A. Yes.

Q. And you acknowledged that they were asking you to please answer the telephone and to negotiate, and you ignored them. Do you recall that subject matter?

A. I didn't say I ignored them, sir. I recalled the letters.

Mr. Nizer: Give me 1552.

By Mr. Nizer:

Q I will go back to 1550, so we will have no doubt about it.

A. Right, sir.

Q. Mr. Zagrans of RKO writing to "Dear Jay," this was a letter.

A. I acknowledged the letter, sir.

• • •

(6611)

Mr. Sawyer: Your Honor, may I object again?

What we are doing, Mr. Wren was on the stand for four and a half weeks on cross-examination, most of the cross-examination was to attempt to establish that there were certain circumstances on which he didn't seek this or he shouldn't have had that and the like.

Now Your Honor has permitted over objection, and I do not reargue that, as part of the examination on this damage Schedule A, the establishment of the fact, although the witness asserted it at the outset, that there are included, since all grosses are here included—that there are also included perforce, by necessity, pictures in which the Viking either showed interest, or they didn't bid, or there was a reason for it, or whatever.

Now, having permitted that, Your Honor, are we also to have then a reiteration each time—

The Court: Mr. Sawyer, pardon me for inter-

(6612)

rupting you. You are saying the same thing that you did before, and I have to repeat: Mr. Wren again says, I recall the letters. But he doesn't say the effect of the letters; he recalls the letters, that is all.

So Mr. Nizer then has to show Mr. Wren that he did not bid on the pictures because of the letters.

Mr. Sawyer: Well—

The Court: Overruled. I have ruled.

By Mr. Nizer:

Q. At 1550 we read to the jury this letter, sent by RKO to you:

Dear Jay:

I have been trying to get you on the telephone to further discuss the FIRST TRAVELING SALESLADY, which is available after August 15th, but unfortunately have been unable to reach you.

Would like very much to discuss this further with you, feeling there may be room in the Viking Theatre on a picture of this nature, especially as I notice this week you are playing a couple of re-releases.

Regards,

Sincerely yours,

RKO

Zagrans

(6613)

So that, my question, between July 25th, the first letter I have just shown you, sir, and August 6th, 1956, you did not communicate with RKO in response to those letters or calls, did you?

A. Evidently not, sir.

Q. "Q. After August 6, when you got this letter you still did not communicate with Mr. Zagrans about this matter, did you?

"A. I can find nothing in the files about it, no, sir.

"Q. Now, you testified under oath that on examination before trial, a deposition, as we call it—

"A. Yes, sir.

"Q. —did you not?

"A. Yes, sir.

"Q. You swore to it. On page 608 did you say in connection with this matter:

" 'We advised them we were willing to negotiate for the picture, we never heard from them, and the pic-

ture opened at the Goldman Theatre on the 12th of December, 1955.' "

Your answer:

"Yes, sir.

"Q. And that was incorrect when you swore

(6614)

to that?

"A. Yes, sir. Now that we found this, right, sir.

"Q. Isn't it clear now, sir, that far from your not having heard from RKO in their effort to sell you this picture they were really chasing you by phone and letter, trying to get you to have an interest in the picture; isn't that correct now?

"A. Yes, sir.

"Q. You have no grievance about this picture at all now that you see these letters, have you?

"A. No, sir.

"Q. And you withdraw the grievance that you once asserted, don't you?

"A. Yes, sir."

Did you make those answers?

A. I did, sir, but where does it say I say I ignored the picture?

Q. I didn't say you ignored the picture.

Well, wait a minute. Where does it say it?

I have just gone through reading to you from the RKO branch manager, saying, and I will re-read that one sentence:

(6615)

"I have been trying to get you on the telephone to further discuss the FIRST TRAVELING SALESLADY."

"We would like very much to discuss this further with you."

And, neverthless, you have testified you didn't get in touch with them and he couldn't reach you on the phone.

Didn't you ignore that picture?

A. You originally said, didn't you testify that you—

Q. Did you ignore that picture?

My last question, sir.

A. "Didn't you say that you ignored the picture?" I did not say that I ignored the picture, no, sir.

Q. Well, you consider that after I have read these letters from RKO, saying, "We have been trying to get you on the phone; we left word with your secretary"—

A. Everything in there I concede, sir, except when you are trying to put words in my mouth. I do not say "ignored" anywhere in there, sir.

Q. Well, I will read another letter to you, sir.

A. Fine, sir.

Mr. Nizer: May I have the original? I may as well read the letter itself.

The Court: Well, Mr. Nizer, isn't it a question of words here?

(6616)

Mr. Nizer: All right, sir.

The Court: Mr. Wren, you got the letter and you did nothing about it?

The Witness: I agree, sir.

The Court: All right.

By Mr. Nizer:

Q. And you asserted, as we have agreed I think from these minutes, that you have no grievance about this picture now that you see this letter?

A. I have said that before you read the letter, sir.

Q. Therefore now, nevertheless, in that case of that picture you took the gross of that picture and put it into Sched-

ule A as a basis for damages on which you are to collect some money?

A. Whatever the gross for FIRST TRAVELING SALESLADY was at the Goldman Theatre it is included in Column 1, yes, sir.

Q. So the answer to my question, if you wanted to be brief about it, is, yes?

A. I answered that, sir.

Q. Now, you also took BEYOND A REASONABLE DOUBT and you put it in there, although you withdrew your complaint about that in a similar way.

A. Yes.

Q. And that is true of TENNESSEE'S PARTNER, is it not, that

(6617)

you put that in there too—

A. Yes, sir.

Q. —under the same circumstances?

A. Yes, sir.

Q. Now, in addition to those, you ignored completely an outstanding picture of RKO called THE CONQUEROR, with John Wayne and Susan Hayward, didn't you?

A. I didn't bid on it, sir.

Q. Well, you didn't bid or negotiate for it, did you?

A. No, sir.

Q. All right. But you have taken $82,000 of that gross at the Mastbaum Theatre and you have put it in also as a claim for damages, haven't you?

A. Yes, sir.

Q. And, to be brief, you have also included other pictures that you neither negotiated for or bid for, RKO picture —SUSAN SLEPT THERE, that is included, isn't it some $22,000 gross, with Dick Powell and Debbie Reynolds.

A. Some $22,000?

Q. I say it is $22,624, I said some $22,000.

A. Right, sir.

Q. You put that in?

A. Yes, sir.

Q. And you put in UNDER WATER, Jane Russell, another RKO

(6618)

picture, some $34,000; you have added that in there?

A. Yes, sir.

Q. Although you ignored that picture?

A. (No answer.)

Q. Now, it is clear, isn't it, if you take this $82,000, and the $22,000 and the $35,000, you have already got $140,000 or $150,000, and if you take the 25 pictures, that would involve hundreds of thousands of dollars of gross.

A. I won't agree to that, sir. You said hundreds of thousands, and you said before on Paramount, it didn't come to hundreds of thousands. I won't agree on that until I add it up, sir.

Q. All right, then let us add it up.

You write down just the pictures I have mentioned.

A. Right, sir.

Q. THE CONQUEROR.

A. THE FIRST TRAVELING SALESDAY.

Q. You write it right down there. I haven't got the FIRST TRAVELING SALESLADY. I will even skip those two. Take TENNESSEE'S PARTNER, which is $6,000 roughly.

A. $6,000?

Q. Yes.

A. Right, sir.

(6619)

Q. $82,000 for THE CONQUERER.

A. Right, sir.

Q. $23,000 for SUSAN SLEPT HERE.

A. Twenty-three?

Q. Yes. I am giving you rough figures.

UNDER WATER, with Jane Russell, $35,000, round figures.

A. Right, sir.

Q. Now, how much have you got already on those few?

A. $146,000 sir.

Q. All right, now there were 25 pictures of RKO that fall into the category where you didn't negotiate or make a bid for; correct?

A. Did they release 25, or 25 I did not go after?

Q. 25 you didn't. I have names here of them. If you want me to I will give you each of them.

A. No, I just wanted to know—

Q. Now, if you added another 20, without going through the calculations, which would take 10 or 15 minutes, if you added the grosses of 20 more pictures to $148,000 would you have several hundred thousand dollars of grosses, for round purposes; won't you admit that?

Mr. Sawyer: Do you have a total there?

The Witness: No, I don't think so.

(6620)

By Mr. Nizer:

Q. You don't think so?

A. No, sir.

Q. Well, how much would you say, less than $200,000 or more?

A. Not several hundred thousands, sir. You keep saying several hundred thousands.

Q. I do and I mean it.

A. Several hundred thousands?

Q. Yes.

A. Then I would like you to give me the grosses.

Q. Well, no, I will save time: What do you say if you took a rough estimate, because I am not trying to demonstrate this by dollar, I just want to show the technique you

followed. How much for the 25 RKO pictures will you assume there that you have in grosses?

A. Whatever the gross is in there, sir.

Q. And that would amount to well over $200,000 if you have $148,000 for four?

A. Yes, sir, it would be over $200,000.

Q. It would be between $200,000 and $300,000 that you put in Schedule A?

A. I just said over $200,000, sir.

(6621)

By Mr. Nizer:

Q. Your counsel and you made a list of 87 pictures—do you recall that under His Honor's ruling?

A. I did not make that, sir. Counsel did make that list, yes, sir.

Q. You have seen that list?

A. I have seen it pass back and forth there, yes, sir.

• • •

(6622)

Q. Of the 87 pictures that I have talked about, that your counsel made a list of, the Viking obtained by negotiation or bid 37, correct?

A. Counting double feature shows, yes, sir.

Q. I don't care how you played them.

A. Yes, sir.

Q. There were a few double features. Let's not build this up.

A. Yes, sir. I am not building it up.

Q. How many double features did you have, two or three?

A. Two.

Q. All right, two. You got 37. And so that you will know, 34 of those played in the period of suit so that I don't want to stick to 37 because of the three of them are out of the period and I eliminate them from my mind. Is that clear to you?

A. Yes, sir.

Q. You obtained them in the period of suit but three played out, do you understand that?

A. Yes, sir.

Q. I am just giving you that additional fact.

(6623)

A. Right, sir.

Q. And these 34 that you played out of the 87, the 37 that you got from the 87, were pictures that came from all of the eight defendants including RKO, Universal, and all of them; is that correct? They are all represented in those, correct? Is there any doubt of that?

A. Yes. We didn't play them during the period of suit. There are no Columbias in here during the period of suit and there is no Warner Brothers in here during the period of suit.

Q. Did you obtain Columbia or Warner pictures during the period of suit? Not played necessarily.

A. I don't believe Columbia during the period, sir. I think it was after the period.

Q. During the period of suit I give you one picture, THEY CAN'T RUN AWAY FROM IT.

A. I know the picture. I don't think we obtained it during the period of suit, sir.

Mr. Nizer: If we have to prove it, we will. Will you concede that or shall we prove it?

Mr. Steinberg: I would like to see the date on it.

Mr. Nizer: I am sorry, Your Honor, it will take a moment to get that. I will continue.

(6624)

By Mr. Nizer:

Q. In other words, until we have this, you will say that there are 6 rather than 8, or 7 rather than 8; is that it?

A. 6 rather than 8, yes, sir.

Mr. Goffman: 7. BABY DOLL was during the suit.

The Witness: We obtained it during the period of suit; we played it after.

By Mr. Nizer:

Q. So there were 7. You are saying that you got it from 7 companies but if you want to have the 8 prove it to you. We will do that.

Now, the remaining 53—do you know what I mean by 53? 37 from the 80.

A. 7 does not leave 53.

Q. No, no. 6 were awarded to the Arcadia, I am eliminating those operated by Shapiro Brothers, and I have the names of those. Will you accept that without my going through it?

A. Yes, I will accept it.

Q. And one was awarded to Trans-Lux—that is TRAPEZE.

A. Yes.

Q. So of the 87 which you played 34, 7 went to other non-defendant exhibitors—have we got that fact clear?

(6625)

A. Yes, sir.

Q. And this left 43 remaining of the 87, right, after taking off the 37 you got within a period of the suit and the 7 that went to other exhibitors, not defendants in this suit, that left—

A. That made 44 and leaves 43.

Q. 43, right?

A. Yes, sir.

Q. And of those—

Mr. Nizer: I will do this with counsel to save time.

Here is a contract on that Columbia picture.

(Document is shown to counsel.)

Will we now agree that it was within the period of suit? The date, Mr. Steinberg. All right?

Mr. Sawyer: All right.

By Mr. Nizer:

Q. Counsel has agreed so you will accept it, I am sure.

A. Yes, sir.

Q. —that these 37 represented all eight motion picture companies?

A. Yes, sir.

Q. Now, 37 of those 43 played at the defendants' theatres,

(6626)

that is the three Goldman, the three Stanley Warner and the Fox Philadelphia; is that correct? Will you accept that?

A. May I have that again, please?

Q. 37 out of the 87—I have made the calculation up to now. Now I am telling you how many of the 87 played at the defendant theatres, the three Stanley Warner, the three Goldman and the Fox Philadelphia, 37 of those 87.

A. 37 of 87 played the Fox, the Goldman, the Stanley Warner Theatres?

Q. Theatres, that's right, of those 87.

A. What happened to the rest of them, sir?

Q. I just went through the calculation. You got 37 played 34, 7 went to the non-defendant exhibitors. I have just done it with you.

A. Yes, sir. 44 and 37 does not make 87.

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(6627)

Mr. Sawyer: We will now stipulate, Your Honor, that since every motion picture is included that played

first-run Philadelphia, therefore, perforce, this is not confined to the 87; and that figure Mr. Nizer says is eight million, we will stipulate to that. So I don't see—

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(6628)

Mr. Nizer: You are not objecting to it, you are ready to stipulate to it so I will do that in a minute.

But I have to answer for one brief moment,

(6629)

Your Honor, the observation of counsel. We are not setting up another schedule of damages in this enterprise. We think in our judgment that this is false and improper and distorted and wrong, every inch of it. There isn't a comma in it that we think is not. Therefore, we are demonstrating all the errors in there. We are not going to Schedule B or C or any other schedule. We are not suggesting any other schedule for him at this time. We think this schedule is wrong and we are going to move again to strike it. But for the purposes of cross-examination, which Your Honor permitted us to have, I think I am on proper ground, and I think Mr. Sawyer now admits it because he is willing to stipulate it. Very well, and let me give you the figures and if counsel will stipulate I don't have to ask you those questions.

The gross receipts, if we limited this case to the 87 pictures, and if we took 37 of those 87 which the defendant theatres played, the gross receipts would be $2,900,650 instead of $11,255,000. Will you stipulate that?

Mr. Sawyer: You want me to stipulate as to the figure? Just the figure, that is all that I am stipulating to, whatever the figure is.

Mr. Nizer: I am stipulating to the fact so let me proceed by cross-examination. You either make an offer to me or you don't.

(6630)

I want to demonstrate that of the 37 pictures which were within the 87 that he had some interest in, and which were awarded to other defendants—he didn't get them all, he got 37 of which he played 34 and it so happens that all the defendants, seven theatres, got 37. It happened to work out that way, all seven got 37 and he got 37 of the 87 and the others went to other defendant exhibitors.

Now, I am asking you either to concede this fact or let me cross-examine.

Mr. Sawyer: Your Honor, I will concede the figure but Mr. Nizer prefaces it with a rather long paragraph or two. Now, if the figure—

Mr. Nizer: No, I am just explaining.

Mr. Sawyer: Well, that is what I want to make clear. The figure that is submitted to me, then I can stipulate. As to the characterizations of it and what it may show and all the other, now, of course, I can't stipulate.

The Court: Naturally you wouldn't agree to his contention but can't you stipulate that a certain number of pictures would reduce it then from eleven million to three million?

Mr. Sawyer: Yes, whatever that figure is.

Mr. Nizer: In other words, without conceding that that would be a correct way to do this, but of the 37

(6631)

pictures which you did have some interest in and which played at the defendants' theatres, if you took the

grosses of those 37 pictures at the defendants' theatres it would be $2,900,650 instead of $11,000,000-something.

Mr. Sawyer: Two million what?

Mr. Nizer: —900,650. You will stipulate to that fact?

Mr. Sawyer: I have no reason to doubt it. I have not added it up, but I stipulate to it, tentatively.

By Mr. Nizer:

Q. And that the first column, column No. 1, Mr. Wren, of $11,255,000, represents not merely the pictures that you had sought in some way or other, the 87, which you got 37, but all the other pictures which you did not seek, but that column represents all the other pictures you didn't seek, whether they were defendants' pictures or non-defendants' pictures or otherwise.

Mr. Nizer: Is that fact stipulated to?

Mr. Sawyer: It has been answered 25 times.

The Court: Yes, I believe so. You agree to that?

Mr. Sawyer: Yes, sir, sure.

Mr. Nizer: That is what I want.

Mr. Sawyer: It has been asked and answered a dozen times.

(6632)

Mr. Nizer: No, don't tell me that. Please tell me if you agree.

And that the amount of gross, which is the difference between the two figures now that you are stipulating, which is purely an arithmetical calculation, that the amount of gross which has gone into column 1 and is reflected therefore in column 3, which the plaintiff, the Viking Theatre, did not seek those pictures on, the

gross of those pictures is $8,242,311. Will you take that figure?

Mr. Sawyer: It is the difference, in other words.

Mr. Nizer: It is exactly that difference.

Mr. Nizer: And which you have nevertheless included in Schedule 1.

Now, let me do it on the basis of numbers and percentages.

73 per cent of the gross on Schedule A, comes from pictures which the Viking did not seek. Will you accept that statistical fact?

Mr. Sawyer: Yes.

Mr. Nizer: Now, let me translate it into number of pictures.

468 pictures, so you have not set forth the number, 468 motion pictures are represented in what you have

(6633)

given as your chart were used by you to make $11,255,000 gross, whereas the plaintiff concedes that he sought 87 pictures of which he got 37 but he used 468 instead of the difference between 37 and 87.

Mr. Sawyer: No, I won't stipulate that because it comes back to this 87 we sought.

Mr. Nizer: Well, I think that is in the record.

Mr. Sawyer: It is not in the record.

Mr. Nizer: I think it is in the record. But, Mr. Wren, I will ask you this question.

Mr. Sawyer: The 87 that we bid on, then I will stipulate.

Mr. Nizer: Negotiated, bid on or sought, according to the record that we have agreed and exchanged documents. You prepared the 87.

Mr. Sawyer: No, we did not agree to it. Mr. Nizer said that dozens of times. It is not agreed to, it is not agreed to now and it has never been agreed to. There are additional pictures which we sought which are not included in that.

Mr. Nizer: There isn't any proof of that.

The Court: Proceed.

By Mr. Nizer:

Q. In any event, column 1, since you have given no numbers

(6634)

of pictures, represents 431 pictures, in addition to those that you got from the 87. Will you agree to that? 431 pictures in addition to the 37 that you got from the 87?

A. They are not in column 1, sir. Column 1 is only the 431 pictures. Mine is below that column, after the totals.

Q. That is what I say, that column 1—column 1 is also your column?

A. I am down at the bottom, sir.

Q. Of course.

A. Seven defendants, 431, yes.

Q. Yes. That is what I say.

A. Yes.

Q. Is that right?

A. Yes, sir.

Q. In other words, 92 per cent of the pictures that you used on that chart were not in the 87 pictures which we have been dealing with in this case. 92 per cent. You have made a calculation of which 92 per cent of the pictures were not among the 87, right? Do you want to figure it out?

A. 92 per cent of the pictures—

• • •

(6635)

The Court: Well, will you agree to it?

Mr. Sawyer: 92 per cent?

Mr. Nizer: That it doesn't make any difference.

Mr. Sawyer: I will agree to it because it doesn't make any difference. It couldn't be. 87 couldn't be only 8 per cent of 400—

Mr. Nizer: It is 37 that you got out of the 87.

Mr. Sawyer: Oh, 37. That is about right, I guess.

• • •

(6636)

Mr. Nizer: Your Honor, there are 468 originally that we have as the figure; 37 of those the Viking got. If Your Honor will therefore subtract that you will find 431 left that he has included in that chart. And if that is divided by what, 37?—431 over 468 should come out 92 if I am right.

Yes, it is 92 plus. It is closer to 93 per cent, Your Honor.

Is that correct, sir? is that right, Mr. Sawyer?

The Court: The figures that you gave me come to 92 per cent.

Mr. Nizer: Mr. Sawyer agrees. Actually, it is above. It is 92.1. All right, 92.

By Mr. Nizer:

Q So that this Schedule A is made of grosses from a number of pictures, 92 per cent of which were not in the 87 and

(6637)

which either weren't defendants' pictures or you conceded you had no claim or you ignored them or you didn't negotiate or bid for them; is that correct?

A. May I have that again, please?

(The reporter read the pending question.)

The Witness: I don't understand the 92 per cent of which were not in the 87.

By Mr. Nizer:

Q. Well, I thought that we had just stipulated that. I will go through it again if I have to.

Mr. Sawyer: Well, the objection was all that long characterization.

Mr. Nizer: It is not a characterization and it is a fact and I am trying to get the witness to state that it is a fact.

Let me try to illustrate it by individual situations, maybe that will make it a little clearer for you.

By Mr. Nizer:

Q. The Goldman Theatre played four of the 87 pictures. Do you want the names of them so that you will agree to them?

A. I accept that, sure.

Q. All right. Now, those four had a gross—maybe this will make it clear to you. Those four had a gross of $144,000.

(6638)

A. I think that is the one that we added up before.

Q. $144,000. But what did you put down instead of $144,000 for the Goldman?

A. The Goldman Theatre for 123 weeks the gross was $1,562,481.40.

Q. So, therefore, instead of taking from the 87 the four pictures that the Goldman played, which is $144,000—I will write it in lightly here—you took $1,300,000 more representing other pictures than the 87. That is what I am

getting at. That is a fact, isn't it? In making this calculation that is what you did?

A. I said that, yes, sir.

Q. And I am now asking you whether it isn't a fact that if you went through each one, and I could do it, sir, but I am trying to save time, if you went through that each time that you would come out as follows: That you had made calculations on 92 per cent of pictures beyond the 87 in which you did not seek.

A. Beyond the 87?

Q. Beyond the 87.

A. Yes, sir, beyond the 87.

Q. That's right. And also in terms of dollars—in other words, you have included in that 92 per cent, now that we agree

(6639)

on the percentage—91 is it?—92 plus—92 per cent, you have included, and this is how you got to those pictures, pictures that were distributed by companies that were not defendants in this case, right?

Mr. Sawyer: Objected to, Your Honor, as totally repetitious. He is back to the non-defendant distributors.

Mr. Nizer: I am summing up.

By Mr. Nizer:

Q. You have included in that, to make it clear with respect to these figures, that 92 per cent you have included pictures that the defendants did not distribute. That is one item in there, right?

A. I have said yes.

Q. And you have included pictures that you concede that you have no claim against. Remember, we went through that?

A. Yes.

Q. And you have included pictures which you ignored and didn't try to make any negotiation?

A. I wouldn't go for that "ignored," sir.

Q. Well, if I don't use the word "ignored," pictures that you have—

A. I did not bid for.

Q. Or negotiate for?

A. Or negotiate for.

(6693a)

Q. You included those?

A. Yes, sir.

(6640)

Q. You include those in that?

A. Yes, sir.

* * *

Q. Now, included also in this 91 per cent are a large number of what you have called slough pictures; do you remember that phrase?

A. Is it 92 per cent or 91 per cent now, sir?

Q. 92.

A. All right, sir.

Q. All right, sir. 92. You have included in that 92 per

(6641)

cent a large number of what you have characterized as slough pictures, have you not?

A. I don't recall having said that a large number of them are slough pictures, sir.

Q. Well, if it is the word "large," let us make a little progress at a time.

Do you recall testifying that there were a number of pictures which you said were slough pictures that you wouldn't play at your theatre but which the Goldman and the other Stanley Warner played; do you recall that testimony or must I show it to you?

A. No—I recall that, sir.

Q. All right; now, it is a fact, then, isn't it, that there were a number of pictures—and I will give you just a list of, well, 29 that I have here—there are more—if you want me to—there are a number of pictures which have national film rentals of 291,000, 180,000, 277,000,—mind you, national film rentals?

A. Yes, sir.

Q. And that you said you wouldn't play for love nor money even if you could get them?

A. No. I didn't say that. Now you are pouring it on. I didn't say for love nor money.

Q. Well—

(6642)

A. Please don't put words in there for me. I have enough trouble with what is in there.

Q. Well, if we don't use the colloquialism—if we don't use the colloquialism, let us not say, "for love nor money,"—

A. No. Let's don't.

Q. —what I was characterizing was what I think was the substance of what you said, that you wouldn't play those pictures at the Viking Theatre because of their slough quality; you recall that?

A. I have said that; yes, sir.

Q. Yes.

A. Thank you.

Q. And, nevertheless, those very pictures were played by Stanley Warner and Goldman Theatres; you admitted that?

A. Yes, sir,—

Q. And those grosses—

A. —some of them.

Q. And those grosses even on the bad pictures—I am not talking of the good now—of those slough—

A. I know who got the good ones.

Q. What?

A. Go ahead, sir.

Q. Of the bad pictures you have also included in Schedule 1 as a base for damages for you even though you wouldn't play

(6642)

them at your theatre?

A. Yes, sir.

Q. All right. Very recently, incidentally, in connection with these figures, as recently as a week ago, you revised that schedule to add the Stanton Theatre, the Stanley Warner Stanton Theatre; that is this theatre, the last one on the line; you did this chart over within a week or so, didn't you, and you added this?

A. I don't recall the date, but it is a known fact that we added the Stanton Theatre; yes, sir.

Q. I mean a known fact recently in the course of trial; it wasn't in previously; you know that, don't you?

A. Certainly I know that, sir.

Q. Now, the Stanton Theatre played two of the 87 pictures. How many did you calculate when you put in the Stanton d. you know? How many pictures did you take the grosses—

A. Whatever they played—

Q. No—I didn't ask you that.

A. —during the period of suit is in there.

Q. I am trying to show you how you got it up. I don't want whatever they played. Suppose I supply the figure. You took, instead of the two that they pl ed out of 87, you took 163 and puth the gross in, didn't you?

(6644)

Mr. Sawyer: Is that the number they played?

Mr. Nizer: Yes.

The Witness: Well, if that is what they played, that is in there.

By Mr. Nizer:

Q. Yes; and those were—

Mr. Nizer: Withdrawn.

By Mr. Nizer:

Q. Now, on Schedule A you have given the total grosses of the defendants' theatres for the period in suit, the total grosses of all the defendants' theatres for the period in suit?

A. Yes, sir.

Q. And that period is exactly 123 weeks; will you accept that?

A. Not exactly.

Q. It is two years.

A. It is 123 weeks and three or four days, sir.

Q. Well, all right. I will take that.

And you have also taken the same period for the Viking Theatre, 123 weeks and three days?

A. Yes, sir.

Q. And that is how you subtracted one from the other?

A. Yes, sir.

(6645)

Q. Therefore, your Schedule A assumes that the Viking would have grossed the average gross of the seven defendants' theatres during the identical period of time, doesn't it?

A. I didn't get that, sir.

Q. I didn't hear that.

A. I didn't get that.

Q. Oh.

A. I didn't understand it.

Q. Your schedule is built on the theory or on your assumption that the Viking would have grossed, the total you have there, the average gross of the seven defendant theatres, you took an average of those seven, didn't you?

A. Yes, sir.

Q. And you assumed that the Viking would have grossed what the average was—and that is why you have subtracted one from the other—for the identical period of time; correct?

A. That the Viking would have grossed the average of—

Q. The seven defendants' theatres.

A. You mean $960,989?

Q. That is why you subtracted it; that it how you get your bottom figure? Isn't that what you—

A. The Viking would have grossed?

Q. That—not grossed—that there would be—yes, the gross after film rental, when you got all through with it,

(6646)

you would assume that that is the reason that you got this average here?

A. Yes, sir.

Q. That the Viking would have done in the same period of time what the average of these seven theatres did; is that correct?

A. Yes, sir.

Q. And in order to reach the conclusion on Schedule A, column 3, that is the assumption, that they would have done the same result in exactly the same period, 123 weeks and three days, to take your figures; is that correct?

A. Oh, yes.

Q. That is your assumption in that chart?

A. Yes, sir.

Q. And if that assumption is wrong, of course, that chart is wrong, isn't it?

A. Not necessariiy so, sir.

Q. Not necessarily?

A. No, sir.

Q. You mean no matter how many errors you find in that, it is still O.K.? Is that what you mean?

A. No. I didn't say that.

Mr. Sawyer: He is speaking about 123 weeks,

(6647)

I believe, Mr. Nizer?

By Mr. Nizer:

Q. I thought that I asked you and you agreed, and if you don't, tell me so—

A. All right. Go right ahead, sir.

Q. —that your assumption of your theory for this chart is that the Viking should have done or would have done the exact same as the average of the other seven theatres in the same period of time, 123 weeks and three days.

A. The Viking would have had that amount left.

Q. Yes. All right. Left. That is the result of your chart?

A. Yes, sir.

Q. That is based on that assumption?

A. Yes, sir.

Q. Now, if that assumption that it would do the same in 123 weeks and three days is wrong, that chart is wrong to that extent, isn't it?

A. To that extent.

Q. Well, obviously. Now, you have, nevertheless, taken the position in this suit, haven't you, that the Viking Theatre at times needs more playing time to equal the gross of the larger defendant theatres; even if it be assumed that it could equal it, it would require more time; you have taken

(6648)

that position, haven't you?

A. Yes, sir.

Q. For example, haven't you volunteered under direct examination to Mr. Sawyer in the case, let us say, of

CAINE MUTINY, that you would have had to play additional weeks in order to equal, as you thought you could, the gross at the other theatres; correct?

A. Yes, sir.

Q. And in that case you estimated that you would have needed five more weeks, didn't you?

A. I believe that is right.

Q. In other words, the Randolph played nine, and you said, "Well, I could have done it, but it would have taken me 14 weeks"; do you remember that?

A. I believe that is right; yes, sir.

Q. And do you remember we even calculated in percentage that it would take you 55 per cent more playing time than the Randolph to equal the Randolph's gross? Do you recall that, sir? Do you remember that figure?

A. Do you mean 9 to 14 is 55 per cent? Yes, sir.

Q. Do you recall we went over that?

A. Five additional weeks, sir.

Q. I don't merely mean that that is the correct percentage,

(6649)

but that you stated that it would take you 55 per cent more time to equal that gross at the Randolph.

A. That is the percentage; yes, sir.

Q. And the reason for that, Mr. Wren, is that wherever at another theatre the weekly gross is above 34,000, which is your top gross on NOT AS A STRANGER at the Viking,—

A. Yes, sir.

Q. —wherever it is higher—for example, in CAINE MUTINY it was seventy thousand, one week—it takes you more time according to your theory to get there; is that correct?

A. Yes, sir.

Q. So that this same principle would apply, this same reasoning, to any situation in which the other theatres

grossed more than the top gross you ever made, which is 34,000; you would need more time to equal it in the same way;—

A. Yes, sir.

Q. —correct?

A. Right, sir.

Q. Now, there are in Schedule A a number of pictures in addition to CAINE MUTINY in which the weekly grosses were larger than your top gross, and therefore the—there is included in Schedule A a number of pictures which would have required more playing time for the Viking, assuming that

(6650)

you could equal it, but you would have to have more playing time to do it; right?

A. Yes, sir.

Q. And if I told you that there are, according to an analysis of the pictures that you have included in Schedule A, 24 pictures in which it would have taken you longer, according to your own definition of a moment ago, it would have taken you more weeks to equal the gross of the other theatre, the defendant's theatre, would you subject to check accept that as at 24 such instances?

A. If you say there are 24 pictures that grossed—

Q. 24 pictures.

A. —the first week more than thirty-four thousand, I would accept that subject to check.

Q. And sometimes, in one instance of CAINE MUTINY, for example, or another, the second week is even above the thirty-four thousand; for example, in CAINE MUTINY—let me illustrate it—it is forty thousand; you remember it?

A. Yes, sir.

Q. So that when I am talking of instances, I mean weeks which were above—it is a little less than 24 if you

take pictures—but weeks there were 24 such instances of higher weeks that you would have needed more time.

A. Is it weeks or pictures, sir?

(6651)

Q. I say that it is about 21 or 22 pictures, not 24, but that there are weeks among them that make it 24. Do you understand that?

Mr. Sawyer: We would stipulate to that, too. We would stipulate to the weeks, Mr. Nizer.

• • •

(6652)

By Mr. Nizer:

Q. Assuming that the defendant gets a gross, the defendant theatre in a year, have you not testified in answer to my questions that it would have taken you in the case of quality pictures where the gross is higher, a year and three months, a year and four months, a year and five months to equal that gross of those defendants' pictures? In other words, if you took it over the year, it would take more time for you to do it? Did you so testify?

A. I haven't so testified to that; no, sir.

Q. All right. Let us see.

A. If I would list all of the quality pictures—

Q. Let us see.

Mr. Sawyer: Let him finish.

By Mr. Nizer:

Q. Now, just a moment, sir. If you haven't so testified, let me show it to you and we will proceed that way.

Mr. Sawyer: I think the witness should be allowed to explain, Your Honor.

Mr. Nizer: I will give him a chance to, if you will let me read it to him. He may not wish to explain anything.

Mr. Sawyer: He started to say something and he was interrupted.

(6653)

The Court: Well, he said he didn't say that. Isn't that what he said?

Mr. Sawyer: That is right.

The Witness: Not the way he described it.

By Mr. Nizer:

Q. I asked you—and I start in the middle because I just want to get to this point:

"Q. If you played a lot of good pictures, a lot of quality pictures, you would have had to play a year and four months or a year and five months or a year and three months—nobody could be exact in the way you are assuming this—in order to equal the gross boxoffice receipts at the Randolph? In other words, you would need more playing time to equal it? Isn't that so, mathematically?

"A. Yes."

A. Yes, sir.

Q. Did you make that answer?

A. Oh, yes, sir, but that is different from what you just said.

Q. Do you stand on that answer?

A. On that answer, yes, sir—that is right—but that is different from what you said.

Q. I don't think so,—

(6654)

A. Well, I think so.

Q. —but we will not quarrel about it. You agree to that, do you?

A. I would agree to that; yes, sir.

Q. And, of course, one of the reasons that this happens is that, for example, if you take CAINE MUTINY—we

went over this—that played at the Randolph which has 2020 seats?

A. Yes, sir.

Q. And your theatre has 1017, so it is exactly double, let us say, within a couple of seats?

A. Yes.

Q. And that is why, is it not, that the CAINE MUTINY can throw off seventy thousand in one week, whereas you in your best week do thirty-four; it is twice the number of seats and that is a factor in that situation; isn't that so?

A. Well, it doesn't work out that way, because twice the number of seats he should have grossed seventy-eight thousand.

Q. Thirty-four thousand twice is how much?

A. Oh, I mean sixty-eight thousand. I am sorry, sir.

Q. So it does work out that way, doesn't it?

A. Approximately; yes, sir.

Mr. Sawyer: By the way Mr. Nizer, we only got about 15 pictures.

(6655)

Mr. Nizer: Well, I will check that with you during the lunch hour. I will give you the names.

By Mr. Nizer:

Q. And while on this subject, sir, before I conclude with my calculations of time, you have included in the schedule A seven theatres, haven't you? You have taken the average of those gross receipts of those seven theatres only. You haven't taken all the first-run theatres in this Philadelphia territory to get an average, have you?

A. They are listed right there, sir. No, sir.

Q. Please answer my question. If it is so, then just say "Yes."

A. I said, "No, sir."

Q. What is that?

A. I said they are listed there. We did not take the other theatres. Other than non-defendant theatres are not listed here.

Q. And you have taken among those seven all theatres which are larger than the Viking with the exception of one which is the same size; is that correct?

Mr. Sawyer: What?

The Witness: Yes, sir.

Mr. Sawyer: One which is smaller, you mean.

By Mr. Nizer:

(6656)

Q. And you have omitted from Schedule A all first-run theatres which are smaller than the Viking in making your average, haven't you? Just say—tell me whether you did or not, don't argue about it.

A. I am not going to argue and you are not going to tell me what to say. The non-defendant theatres are not listed; right, sir.

Q. All right. Now, answer my question. I don't ask you whether they were defendants. No matter how you characterize them, in making up an average that you were going to compare yourself with, you omitted all theatres that were smaller than the Viking Theatre, didn't you?

A. Well, it just so happens they are not in this suit.

Mr. Sawyer: No. The Midtown is on there.

The Witness: Yes. The Midtown is smaller. That is right, sir. Thank you, Mr. Sawyer. The Midtown is smaller than the Viking, sir.

Mr. Nizer: Thank you, Mr. Sawyer.

The Witness: The Midtown is 23 seats smaller than the Viking.

By Mr. Nizer:

Q. How many seats is the Midtown?

A. 23 seats smaller than the Viking.

Q. 23 seats?

(6657)

A. Yes, sir.

Q. In other words, instead of 1017 it is what—990 what?

Mr. Sawyer: Four.

By Mr. Nizer:

Q. 994. Now, with the exception of the Midtown, which is 23 seats smaller, you took theatres that were twice the size; right?

A. Yes.

Q. Three times the size?

A. Yes, sir.

Q. And four times the size of the Viking; correct?

A. Yes, sir.

Q. But you omitted in taking your average the Trans-Lux, which has how many seats, first-run theatre?

A. Under 500.

Q. The Arcadia, how many seats?

A. Just over 600.

Q. The Studio—

Mr. Sawyer: Objected to.

By Mr. Nizer:

Q. —how many seats?

The Witness: 378.

Mr. Sawyer: Objected to, the conclusion that it is first-run.

(6658)

The Court: Yes.

By Mr. Nizer:

Q. The World.

The Court: Yes. We had some controversy as to the World and the Studio.

Mr. Sawyer: Yes, sir.

Mr. Nizer: Oh, no. I will come to that, Your Honor. I will spell it out with Mr. Wren. I don't think—

Mr. Sawyer: You were going to come to it before, Your Honor, and in the meantime Your Honor sustained my objection. If we do get to it and there is contrary evidence, then I think I will be in.

Mr. Nizer: All right. Then let us come to it right now.

By Mr. Nizer:

Q. Do you tell me and this Court, the learned judge and jury, that the Studio is not to be included as a first-run theatre competing with you in this case?

A. The Studio—

Q. Is that what you are telling us?

A. The Studio Theatre only played two or three first-run pictures.

Q. I am not asking you that. Do you tell me that it is not one of the first-run theatres that competes for first-run

(6659)

product even against you in this situation during the period of this suit?

A. In a minor way; yes; they did.

Q. In a minor way. Did the Studio bid against you for the picture PICNIC?

A. I believe they did.

Q. Did it bid against you on CAINE MUTINY?

A. I believe they did.

Q. Did they bid against the Randolph for the CAINE MUTINY?

A. Well, if they bid against me they would naturally bid against the Randolph, because—

Q. Haven't you—

A. The Randolph did not bid for the CAINE MUTINY.

Q. Haven't you actually—haven't you actually conceded that the Studio bid would have given a larger rental on CAINE MUTINY than the Viking bid would have given? Haven't you so conceded in this case?

A. I have said with the house expense at the Studio, the same gross, they would have thrown off more film rental to the film company; yes, sir.

Q. Than what company—than what theatre?

A. Than the Viking or the Randolph.

Q. Yes. That is the kind of comparisons you are making?

(6660)

A. That is a good comparison, sir.

Q. All right. Then on that basis, sir, you would consider them a competitor, wouldn't you?

A. Every theatre downtown is a competitor, including the Palace Theatre.

Q. Including the Studio?

A. Including the Palace.

Q. No. Answer my question, sir. Including the Studio?

A. Including the first-run Palace, sir.

Mr. Nizer: I move to strike it out, Your Honor, in view of the witness'—

The Court: That will be stricken. Answer the question and then say, "also," whatever it is, Mr. Wren.

The Witness: I will answer you. Thank you.

By Mr. Nizer:

Q. The Studio is a first-run competitor in this territory, isn't it?

A. Yes, sir; and also the Palace.

Q. And the World is a first-run competitor in this territory?

A. And also the Lane, too.

Mr. Nizer: Now, Your Honor, I move to strike it out.

Mr. Wolf: May it please the Court, I move

(6661)

that the statement—

Mr. Nizer: I think that this is trifling.

The Witness: They are first-run theatres, Your Honor.

Mr. Nizer: No one is asking how many others he may claim. I am asking whether these 11 theatres that we have been discussing are first-run competitors, and that is all the question calls for, and I don't think the witness should argue about other theories he may have.

The Court: I agree with you, Mr. Nizer.

Mr. Nizer: Thank you, sir.

The Court: He may be asked in redirect.

Mr. Nizer: I take it my motion to strike the other Lane and the other is stricken.

The Court: Granted.

Mr. Nizer: Thank you, sir.

By Mr. Nizer:

Q. Now, without going further, sir, will you now accede that so far as this market is concerned in the com-

petitive area the Studio and the World compete for pictures and take first-run pictures from leading companies when their bids induce the companies to give it to them; will you concede that?

A. Yes, sir.

(6662)

Q. All right. Now, in coming back to your seat average, in making your average you took only theatres, we have seen, which were larger with the exception of that Midtown and left out those which were half the size of yours in making that computation of average. Now, have you computed, therefore, since you are taking the average of the gross receipts—that is what you have done, haven't you?—you have divided it by seven to get the average of the gross receipts; that is this column; correct, sir?

A. I have divided that by seven; yes, sir.

Q. Now, did you do the same with seats? Did you find out what the average of the theatre is with which you are comparing yourself in seats?

A. No, sir.

Q. Have you got a piece of paper?

Mr. Nizer: This will only take a minute, sir.

By Mr. Nizer:

Q. Please write down the seats. Of the seven theatres whose grosses you averaged: Stanley, 2932; Mastbaum, 4387; Fox, 2422; Midtown, 994; Randolph, 2020; Goldman, 1188; Stanton, 1373.

A. No, sir.

Q. What is it?

A. Stanton is not 1373, sir.

(6663)

Q. During the period of this litigation?

A. Oh, oh, I am sorry.

Q. Which I am limited to. That is a total of what? 15,316. Could I help you add it?

A. May I add it up, please?
Q. All right.
A. 13,816, sir.
Q. 15,316, isn't it?
A. I have 13,816. 2932?

• • •

(6664)

Q. Before the lunch hour, Mr. Wren, I asked you whether you had averaged the grosses of all the seven theatres to reach an average gross and you said yes, and then I asked you if you had done the same with the seats to reach an average seat to see how that worked out, and you said you hadn't. So I read off to you the figures—

A. Yes, sir.

Q. —and suggested that the total was 15,316, and I think you told me yours was 13,000.

A. And you were right, the total is 15,316.

Q. I didn't hear that.

A. You were right, the total is 15,316.

Q. All right. Now that means that the average theatre that you are comparing the Viking to is 2,188 seats; that

(6665)

is the average you took.

A. Yes, sir.

Q. To compare with the Viking, which is 1,017. So that that is more than twice the size, the average that you took, to compare the Viking with, correct?

A. Yes, sir.

Q. And in order to get to that average of twice the size of the Viking, that average only results in the fact that haven't taken the smaller theatres in the territory, you only took those on the board, correct?

A. Yes, sir.

Q. Now, you have told us, have you not, at one point in your testimony that a smaller theatre than yours, you

couldn't accept a comparison of grosses because the smaller theatre, the gross wouldn't have been there for a smaller theatre; haven't you told us that?

A. When did I say, sir?

Q. Have you not told us with respect to a theatre that is smaller than yours, when you were making comparisons of possible grosses, that the reason you wouldn't agree with the calculation was that the smaller theatre, that was roughly half your size, wouldn't have that gross that you would have at the Viking?

A. I think I—

(6666)

Q. That the gross wouldn't be there?

A. I think I also said, sir, and added to that that it would take extended playing time to make it up.

Q. I don't think you did, but first answer my question: Did you agree to that?

A. I don't believe I did agree to that, sir.

Mr. Nizer: 3678.

By Mr. Nizer:

Q. At page 3678:

"If you did the same for the Trans-Lux, it would have paid $1,710 more each week than the Viking on the same type of calculation, subject to your check?"

By you:

"A. Well, you couldn't use the same calculation, because the gross would not have been there in the 490-seat theatre."

And my comment was:

"Ah."

Then, on the next page:

"A. It would take them a longer period of time."

A. That is what I said, sir.

Q. Yes, you did. And I said:

(6667)

"Ah, I see; the Trans-Lux is 490 seats?

"A. Yes, sir.

"Q. The Viking is a thousand?

"A. Yes, sir.

"Q. So the Trans-Lux is half the size, roughly, of the Viking?

"A. Yes, sir."

And you stand by that statement—

A. Yes, sir, I do.

Q. —that it would take a much longer time?

A. Yes, sir.

Q. All right. Now let us see what that time involves. Without going through the calculation that we made this morning, I hope you will remember that we got to the point where the defendant theatres played out of the 87 pictures that we have been talking about 37; do you recall that calculation?

A. Yes, sir, I do.

Q. Now, did you total the playing time of those 37 pictures alone at the defendant theatres?

A. No, sir, I did not.

Q. Well, you have the basic records here and it could be done.

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(6668)

Q. Now, I could read off to you, I have a list here of the 37 theatres in the 87 that played at the defendants' theatres, and the number of weeks they played at those defendants' theatres, but rather than read them off and have you total them, will you accept, subject to your checking, or counsel may have the data there, the computation of 189 weeks for those 37 pictures to play, on the 87 at the defendants' theatres; will you accept that?

A. Subject to check, yes, sir.

Q. All right. So if you had had—those were the pictures that you had an interest in—

Mr. Sawyer: Objection, Your Honor, for the same reason.

By Mr. Nizer:

Q. Those 37 pictures in the 87 are pictures which in this litigation you said you had made either an offer for, or a bid, or had some kind of a negotiation or interest in, and somebody else got them, is that right?

A. Yes, sir.

• • •

(6671)

Q. Now, we have just passed the point of taking 189 weeks for those 37 pictures within the 87 that played at the defendants' theatres. I bring you back to that to have the continuity, you see, so you can follow me.

A. Surely.

Q. Now, if you had had all of those pictures. In other words, if you had gotten all of the 87 and played them—I will give you the calculation—it would have taken you 312 weeks to play them all out. Will you accept the figure subject to your check?

A. 212 weeks?

Q. Yes.

A. Subject to check, yes, sir.

Q. 123. 123 in three days, and 189 We just had the two figures.

312 I said, not 212.

A. 87 pictures. 312 weeks.

(6672)

Q. That is right.

A. Subject to check, yes, sir.

Q. Therefore, 312 weeks, if you will calculate it, is six years exactly, it comes out, it so happens, doesn't it?

A. Yes, sir.

Q. 52 into that is six?

A. Yes, sir.

Q. So that if you had gotten the pictures that you are making a claim for, and those that you should have gotten, which you are computing, in addition to all the hundreds of others you put on that chart, but just limiting myself now to the 87; do you understand that?

A. Yes, sir.

Q. It would have taken you six years to play them all, would it not?

A. Yes, sir, based on that assumption.

Q. That is right.

And, of course, that is about three times the period of the lawsuit here, isn't it?

A. Yes, sir.

Q. Now, assume that you had eliminated all the pictures that you played, pust take the opposite extreme, and just got the 87, that is, the balance of the 87 that you didn't play; that alone would have been 189 weeks if we just had

(6673)

that figure, wouldn't it?

A. Yes, sir.

Q. That would have been 189 weeks.

A. Pardon me, sir. That is not correct.

You said eliminate the pictures that I played and it would equal 189 weeks. You told me 37 pictures equaled 189 weeks.

Q. That is what I said, yes.

A. Well, 37 from 87 would leave 50 pictures. We have to account for 13 more here.

Q. All right, you didn't understand my assumption. First we say that if you had gotten them all it would have taken you six years—

A. Yes, sir.

Q. —to play them all.

A. Yes, sir.

Q. Now I say, let us assume that you would not have played all those that you did, those that you did get and play, but that you would have gotten the others within the 87 that went to the defendants. Do you understand that? The others.

A. To the defendants, yes.

Q. Then that would have been 189 weeks on a minimum basis, and that would be, of course, three years and 33 weeks,

(6674)

wouldn't it?

A. I would assume that is right, sir.

Q. So consequently the time ratio that you assumed as a basis, when you started with this analysis, that they would do the same in the identical period of time, certainly doesn't work out, does it, on this calculation? You can see that, can't you?

A. On your assumption?

Q. Yes, on this assumption?

A. It does not. No, sir.

• • •

Q. Now, I would like to go to that second column for a little while which is called "Film Rental." You see, you deducted film rentals.

A. Yes,sir.

Q. Of course, Mr. Wren, we agree, don't we, that the

(6675)

experience of a theatre operator and his judgment in what pictures to bid for or to negotiate for, and how much to offer, is an important factor in what the film rental would be, isn't it?

A. No, we won't agree on that, sir. You can't buy what someone will not sell.

Q. No. You have passed up very important pictures here that you didn't bid or negotiate for, haven't you?

A. Yes, sir, with reasons explained.

Q. And some of those that you passed up were terrible errors on your part; you should have gone for them as a matter of judgment, shouldn't you?

A. I wouldn't say they were terrible errors. I make errors. I am not infallible.

Q. Haven't you testified that you made not merely some errors, but that you made terrible mistakes in staying away from certain pictures?

A. I said "terrible mistakes"?

Q. (Continuing) And not trying to get them?

A. "Terrible mistakes," I said?

Q. Yes.

A. When did I say that, sir.

Q. Is it the word "terrible" that you are surprised about?

A. Yes, it is.

(6676)

Q. I see. Well now, let me read it to you and see what you think.

A. All right.

Mr. Nizer: Give me 634 of the deposition.

I am sorry, Your Honor, it will take me a minute to get this. I did not expect this.

By Mr. Nizer:

Q. Didn't you testify as follows under oath in a deposition?

Mr. Sawyer: What page?

Mr. Nizer: Page 634.

By Mr. Nizer:

Q. (Continuing)

"Q. Incidentally, you mentioned BLACKBOARD JUNGLE. Why didn't you bid on BLACKBOARD JUNGLE?

"A. I will tell you why we didn't bid on BLACKBOARD JUNGLE.

"Q. Well, I am asking you.

"A. Mr. Sley and I discussed it. We were of the opinion it was a little too rough for our house, and we were never—

"Q. It wasn't too rough for the Arcadia, was it?

"A. We were never so wrong in our lives."

(6677)

A. I am waiting for the word "terrible," sir.

Q. Pardon?

A. I am waiting for the word "terrible."

Q. Now, let us not trifle with each other.

Would you say that the meaning of that we were never so wrong in our lives means that you made a terrible blunder in the exercise—

A. No, sir.

Q. —of your judgment?

A. I will not. I never made a terrible blunder.

Q. Do you admit that you made a blunder in your judgment?

A. Yes, sir, we made a blunder.

Q. And that you were never so wrong in your life means that it is one of the occasions in your entire life in which this stands at the peak of your blunders, doesn't it?

A. No, it doesn't stand at the peak. I have made some beauts.

Q. Exactly, and in this very business of passing up excellent pictures, you made some beauts, as you just called it, didn't you, and you have so testified in substance —not the word—

A. No, sir.

Q. Let us not quarrel about the word "terrible."

A. Yes, I have passed up some good pictures, yes, sir.

• • •

(6681)

Q. You recall that I asked you whether you had not marked down as excellent a picture which turned out, had a $294,000 national rental while you went for—withdrawn—that you marked down as excellent a picture which had only a $294,000 national rental, as it turned out, whereas you ignored a picture which had millions of dollars of national film rental, as it turned out later? Do you recall that line of questioning?

A. Well, the line of questioning, sir, I told you the word "excellent" was not mine, it was my predecessor's.

Q. Well, if you recall that, do you recall my asking you:

"That you have made similar whoppers of errors, haven't you, in evaluating pictures?

"I certainly have."

Do you recall making that answer?

A. Yes, sir.

• • •

Q. And the word "whoppers" is at least as strong as

(6682)

"terrible," isn't it?

A. No, it's as good as "beaut."

Q. It is as good as "beaut."

A. Yes, sir.

Q. And isn't it a fact that the worst beaut or whopper that you made was to guarantee $106,000 on a picture called MAN IN THE GRAY FLANNEL SUIT?

Mr. Sawyer: Objected to, Your Honor, as repetitious.

Mr. Nizer: It isn't repetitious.

Mr. Sawyer: To the third degree.

The Court: Overruled.

By Mr. Nizer:

Q. I start again, sir.

Isn't it a fact that one of those whoppers and beauts that you made is that you guaranteed $106,000 on a picture called THE MAN IN THE GRAY FLANNEL SUIT? Didn't you so testify that that was an error on your part?

A. I don't recall having said exactly that, no, sir.

Q. All right. 1584.

Before I go into that, that was the picture on which you had to pay the guarantee and some $60,000 was lost on that picture. That is the big one, isn't it, that guarantee loss?

(6683)

A. You keep saying $60,000, sir. I haven't checked it.

Q. Or 54, or whatever it is.

A. All right, subject to check.

Q. Well, you know what you lost on that, $54,000 due to that guarantee, and that is the amount that you have now put into that schedule and trying to recover from the defendants the fact that you overbid on that picture. Isn't that what you are doing here?

A. No, sir, that is not the truth.

Q. Let's see if you are not, sir. 1584.

"Q. . . . You bid for MAN IN THE GRAY FLANNEL SUIT on April 5, 1956. Will you accept that specific statement?

"A. If that is what you have there, yes.

"Q. But you didn't have any interest in the EDDIE DUCHIN STORY, which was the day before that for bidding, April 2, 1956, did you? That is the one you ignored.

"A. Because we thought that FLANNEL SUIT would be a better grosser."

Did you make that answer?

A. I did, sir, and—

Q. And so—

A. With an explanation now, please.

(6684)

Q. Let me finish and then we will see what explanation you have to make.

All right, before I finish. You want to rush in.

A. The availabilities were not the same on both pictures.

Q. What have the availabilities got to do with—

A. It has everything to do with it, sir.

Q. All right.

A. There isn't two theatres in town that could play GRAY FLANNEL SUIT and the other picture that you mentioned at the same time because they were not available at the same time.

Q. Is that your position?

A. Yes, sir.

Q. All right, then, listen to this.

"Q. So you chose between two good pictures, didn't you, voluntarily?

"A. Yes, sir.

"Q. Nobody compelled you to bid on GRAY FLANNEL SUIT and nobody told you not to bid on the EDDIE DUCHIN STORY, that is a matter of your judgment, right?

"A. Yes, sir."

Did you make those answers?

A. I certainly did.

(6685)

Q. So that now, Mr. Wren, at least in the case of the very picture we are talking amout, THE MAN IN THE GRAY FLANNEL SUIT, you had a choice of two good pictures, as you thought, and you chose voluntarily to take THE MAN IN THE GRAY FLANNEL SUIT?

A. That is not the truth.

Q. Well, then, do you want to take back—

A. THE MAN IN THE GRAY FLANNEL SUIT was available April 3rd and EDDIE DUCHIN STORY you keep indicating was available the same date. It was not available until the end of June. Now, it was impossible to play EDDIE DUCHIN in April, unless you are one of the defendant theatres.

Mr. Young: I respectfully move to strike that out. That is entirely—

The Witness: You have changed availabilities a million times.

Mr. Nizer: I move to strike out that comment, Your Honor.

Mr. Sawyer: The last one I agree with because the witness had no question pending.

By Mr. Nizer.

Q. Mr. Wren, I didn't say what you said I said, and the testimony is here and I am going to read it again.

A. Yes, sir.

(6686)

Q. And if you will keep calm—

A. I will, sir.

Q. All right. Now, just listen.

Mr. Sawyer: Objected to its being read again, Your Honor; repetitious.

The Court: Overruled.

By Mr. Nizer:

Q. "Q. But you didn't have any interest in the EDDIE DUCHIN STORY, which was the day before that for bidding—for bidding—"

A. Yes, sir.

Q. "—April 2, 1956, did you? Did you?"

A. Yes, sir.

Q. ".... That is the one you ignored.

"A. Because we thought that FLANNEL SUIT would be a better grosser."

Now, you made those answers, didn't you?

A. Yes, sir, with an explanation.

* * *

(6687)

Q. Mr. Wren, I did not ask you on this occasion nor did you swear on this occasion that the EDDIE DUCHIN STORY and THE MAN IN THE GRAY FLANNEL SUIT were the same availability date.

A. That's right, that is the crux of the whole thing.

Q. Listen to me, please, sir, so that we can agree.

I didn't ask you that, and you didn't answer that?

A. No, sir.

Q. What I asked you was on April 2nd you could have bid for THE EDDIE DUCHIN STORY, on April 3rd, THE MAN IN THE GRAY FLANNEL SUIT?

A. Yes, sir.

(6688)

Q. And so within one day of each other you had two pictures to make up your mind that you would go for?

A. Right.

Q. Or for both if you wanted to. And you said that you ignored the EDDIE DUCHIN STORY, and the reason you gave on that occasion, and listen to it, is:

"Because we thought that FLANNEL SUIT would be a better grosser."

And when I asked you:

"Q. So you chose, you chose between two good pictures, didn't you, voluntarily?"

You said:

"Yes, sir."

And I even went on to say:

"Q. Nobody compelled you to bid on GRAY FLANNEL SUIT and nobody told you not to bid on THE EDDIE DUCHIN STORY, that is a matter of your judgment, right?

"A. Yes, sir."

Now, I ask you in the light of that testimony, first, if you stand by those answers or do you want to change them?

A. I want to change it to the extent that you indicated both pictures were available at the same time and when I got off the stand I checked and they were not available at the same time.

(6689)

Q. Mr. Wren, I didn't indicate anything of the kind. I said they could be bid within a day of each other.

A. No. You said I had a choice between two pictures and that indicates the same availability, and I didn't have a choice for the same availability of two pictures.

Q. If that is your point, let me ask you now: Did you have a choice on April 2nd and 3rd to bid for one or the other, irrespective of their availability?

A. Yes, sir, I did, sir.

Q. And could you have bid for EDDIE DUCHIN STORY instead of THE GRAY FLANNEL SUIT if in your judgment you thought it was a better grosser?

A. If I would have put the key in the door of the Viking and closed it up until I got other film, yes.

Mr. Nizer: No. I move to strike that out as not responsive, Your Honor.

Mr. Sawyer: I think that is responsive.

By Mr. Nizer:

Q. Could you have bid for both pictures if you wanted to?

A. Hardly.

Q. Well, if you say they are different availabilities, you could have, couldn't you?

A. With the bid that we anticipated on GRAY FLANNEL SUIT would have pushed us possibly past the availability of the

(6690)

other picture.

Q. So, therefore, you did have a choice which you made consciously and voluntarily on the ground that you thought this picture would play so long that you wouldn't play THE EDDIE DUCHIN STORY, right?

A. We knew what—

Q. Answer my question—don't start "We knew"—so that we can get by this and I can go ahead. Is that correct?

Mr. Sawyer: Your Honor, I object. It seems to me that when I had defendants' witnesses on the stand that in answer to a question of mine they were permitted to start "We knew" or "We thought" or something else, and since that was permitted I think this witness should be permitted to do so.

Mr. Nizer: I am giving him every opportunity, Your Honor.

The Court: Yes, he should answer the question and then if he has any explanation he could explain.

By Mr. Nizer:

Q. Didn't you flatly admit that you made a mistake in judgment in this situation?

A. No, sir, I did not.

Q. All right, no, sir, you did not.

A. No, sir.

(6691)

Q. Listen.

"Q. And in the case of THE MAN IN THE GRAY FLANNEL SUIT you did exercise bad judgment as it turned out; you bid too much for it, didn't you?

"A. Yes, sir."

Do you stand by that?

A. No, sir, I do not.

Q. You want to take back this testimony given only—

A. I have other testimony in depositions, sir, regarding this same picture.

Q. My question is, are you now withdrawing this admission that you made under oath in this court when you sat here before this Court and jury a few weeks ago? Are you withdrawing it?

A. I am not withdrawing it, sir.

Q. Do you stand—

A. I want to explain about THE MAN IN THE GRAY FLANNEL SUIT.

Q. Do you stand by this answer?

A. With an explanation, yes, sir.

Q. All right. Now, a moment ago—

Mr. Sawyer: Now, may he make an explanation?

Mr. Nizer: I will in a moment.

Mr. Sawyer: It is always in a moment, Your

(6692)

Honor, but the pace continues.

The Court: He may make his explanation.

By Mr. Nizer:

Q. What is your explanation?

A. The explanation is if we had not put up $106,500 the Viking Theatre would have been closed. We had expe-

rience with Twentieth Century-Fox on a picture called CAROUSEL and we repeatedly denied Fox product plus the fact that Mr. Ricketson came to town and told—

Mr. Sawyer: Just a minute. I would agree that beyond your first statement that the statements are voluntary.

Mr. Nizer: I move to strike out more than the first statement. I move to strike out this characterization of the theater being closed. He has had pictures every day of every period during the entire period. This is an attempt to put in by characterization that which is not the truth in this case and it is not responsive and it is not an explanation of his answer and I move Your Honor respectfully to strike it out.

Mr. Young: I join in that motion.

Mr. Sawyer: The first portion, it seems to me, was entirely responsive as a reason for the size of the guarantee; thereafter I would agree that it should be stricken.

(6693)

The Court: I don't know, Mr. Sawyer, there has been no testimony in this case, even with all of the competitive bidding, as I recall it, that any theatre was closed. Now, the Viking, he said, might have to be closed but it never was.

Mr. Sawyer: His contention is the reason it wasn't is because when they got in a position like that they put up a guarantee as big as this and that could hardly be resisted. That is the witness' position. He doesn't say the theatre was closed. His position was that and I think it is consistent with what Mr. Sley testified, and I submit that has a certain amount of weight. But it is at least responsive as to the reason why he put the bid up.

Mr. Nizer: I move to strike it out, sir.

The Court: I will grant your motion.

Have we not covered this, Mr. Nizer? I think the jury understands exactly.

Mr. Nizer: I have one more question on this. I do want to say that when the witness testified originally, that he did so voluntarily, and then gives his explanation, that perhaps I have a right to ask Your Honor for an admonition to the witness as to the responsibility of his oath.

Mr. Sawyer: I object to that for this reason.

The Court: The objection is sustained.

(6694)

Mr. Sawyer: Thank you, sir.

By Mr. Nizer:

Q. Let me read just one more question and answer and I will drop this.

I start with a question and answer I read so as to combine them.

"Q. Nobody compelled you to bid on GRAY FLANNEL SUIT and nobody told you not to bid on THE EDDIE DUCHIN STORY, that is a matter of your judgment, right?

"A. Yes, sir.

"Q. And if you make a mistake in judgment you don't expect subsequently that either your competitors or the motion picture companies will give you back the money that you lost due to bad exercise of judgment, do you? You don't claim that?

"A. No, sir."

Did you make that answer?

A. Due to my bad exercise of judgment, sir, yes, sir, I made that statement.

Q. And, nevertheless, even though you made that statement, the amount of the film rental, including that guarantee in the $54,000 difference, is included in the second column of Schedule A. It is, isn't it?

(6695)

A. What $54,000 difference? The film rental for THE MAN IN THE GRAY FLANNEL SUIT is in the second colum, as you well know.

Q. I well know, and I am asking you—I think I well know. I am asking you to confirm it. You put in this difference of the $54,000 that was your mistake of judgment, as you testified.

A. It was film rental, yes, sir, that I had to pay to Twentieth Century-Fox.

Q. Of course, and, therefore, though you exercised bad judgment you are now including this as a part of the claim for damages to be repaid for that bad judgement?

A. You are saying it was an exercise of bad judgment.

Q. Didn't you say so?

A. No, sir, I did not.

The Court: All right, let's end that. I think the jury knows whether he said he exercised bad judgment.

By Mr. Nizer:

Q. You have made lots of mistakes of this kind and character in the course of this period of the suit, didn't you?

A. Is that what I said, sir?

Q. Yes, I say you did, but I don't know any more what you will say now. Did you or didn't you?

A. I didn't say anything of the kind.

(6696)

Question 3862.

"Q. Now, in this computation that you made, and since you talked about a number of mistakes when I asked

you only about this picture, haven't you conceded that you made, as I call it, a lot of mistakes, bad ones?

"A. Oh, I certainly have made a lot of mistakes; yes, sir."

Did you make that answer?

A. I certainly did. I got off the street car before it stopped. I did a lot of things wrong.

Q. Didn't you think I was talking about biddiing and negotiating for pictures?

A. No, sir, I did not, because the computation that you are talking about, as I remember, was an assumption purely and simply right from the start.

Q. The question before it—maybe I will follow this for another moment, unless Your Honor wishes me to stop.

The Court: I would request that you stop.

Mr. Nizer: I will, sir.

By Mr. Nizer:

Q. But whatever those mistakes are, you have included them nevertheless in the form of deducting the film rental

(6697)

from the Viking Theatre and asking you for a compensation for those mistakes from these defendants; isn't that what this schedule is?

A. The film rental that the Viking Theatre paid is included in Schedule A, yes, sir.

Q. And among the deductions which you did not make in that film rental—withdrawn. On those instances in which there was any adjustment of any kind on the defendants' pictures, you took it off the film rental, didn't you?

A. I don't understand the question.

Q. In those instances where there was an adjustment granted to the defendant exhibitor, you made a deduction from the film rental of that defendant, didn't you, in making that computation?

A. Naturally. They didn't pay the film rental, why—

Q. Just answer my question. You did?

A. Naturally, with an explanation. They did not pay the film rental so why should I enter it in there. I only charged them for what they paid.

Q. I am not asking you to argue. That is what you did, didn't you?

A. Yes, sir, that is exactly what I did.

Q. On the other hand, you have not included on the lower end of your computation the $15,000 which Universal at one point offered you as an adjustment and which you didn't take and

(6698)

there was a suit after that?

A. Universal did not give us $15,000, as you well know.

Mr. Nizer: I move to strike that our, Your Honor.

The Court: That will be stricken.

You were asked whether they offered to give it to you.

Mr. Nizer: That's right.

The Witness At one time they did, sir.

By Mr. Nizer:

Q. And you have not deducted—and you refused it, didn't you? You wanted more.

A. It was offered to us with the understanding that they had to be relieved of obligations.

* * *

Q. Did you refuse to take the $15,000 for any reason at all?

(6699)

Did you or did you not?

A. Subject to an explanation, yes, subject to explanation.

The Court: All right, make it.

The Witness: The only way you could get the $15,000 was to keep Universal out of the suit.

By Mr. Nizer:

Q. Is that it?

A. That is it.

Q. Now, whatever the reason was, there was a litigation later and Universal won the full film rental and you didn't get the $15,000, right?

A. Yes, sir.

Q. But, nevertheless, even though they offered you the $15,000, and for the reason you gave, you say you rejected it, you did not deduct that $15,000 in the lower column of your film rental, did you?

A. Of course not. I never got it.

Q. And you never got it because you didn't take it?

A. No, sir.

Mr. Nizer: That is all, sir.

The Court: Anything further?

Mr. Young: I want to ask Mr. Wren a question.

By Mr. Young:

Q. You said the last time you went to the Fox Theatre was

(6700)

right after the Milgram interest took over. That is Mr. David Milgram, isn't that so?

A. Yes, sir.

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(6703)

Q. There never was a time when you were operating this theatre on STRANGER, as you testified earlier, that you grossed $105,000 in three weeks, was there?

A. Grossed $105,000?

Q. The best you ever did was $78,000, wasn't it, on STRANGER?

A. I don't understand the question.

Q. The first three weeks of your operation—it is a very simple question—your best gross for three weeks was $78,000 or $79,000 on NOT AS A STRANGER, wasn't it?

A. The first three weeks on STRANGER were $77,912.

Mr. Young: All right.

(6704)

Q. Well, all right, 78,000.

A. Right, sir.

Q. But you never got 105 in any three weeks, did you?

A. No, sir.

Q. And you admit that we did that on THE KING AND I in the first three weeks, don't you?

A. I believe I have admitted that ,sir.

* * *

RE-DIRECT EXAMINATION

By Mr. Sawyer:

Q. Mr. Wren, do you recall being asked whether or not there was ever an instance with anybody during the—I think Mr. Nizer didn't even confine it to the period of suit—but let us say during the period of suit, where more film rental was paid, gross attained at the box office?

A. Yes, sir.

* * *

(6705)

Q. Now, was there ever such an instance?

A. Yes. THERE IS ALWAYS TOMORROW. There was a $17,500 guarantee paid to—to Universal on a 19,780—

Q. No, no. I am asking—

A. I mean a—on NEVER SAY GOODBYE, $22,500 guarantee on a $20,799 gross.

Q. So if it never happened to anybody in the history of first-run Philadelphia that more than—film rental was paid than gross, it happened to the Viking on NEVER SAY GOODBYE, did it not?

Mr. Nizer: Your Honor,—

The Witness: Yes, sir; it did.

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(6708)

Q. Now, do you remember Mr. Nizer said that on the 37—he compared 37 pictures that you bid on?

A. Yes, sir.

Q. And he talked about—I think he said 37, but let us assume 34 or 35 or 36 or 37 pictures that you got.

A. Yes, sir.

Q. And did he supply you—did Mr. Nizer supply you with a total gross achieved by the defendant theatres on the 37 that they got?

(6709)

A. Yes, sir.

Q. What figure did he give you?

A. $2,960,000 for the 37 pictures that the defendants got.

Q. And what was the gross on the—

Mr. Nizer: 29.

By Mr. Sawyer:

Q. —37 pictures that you got?

A. $1,200,357.08.

Q. That figure that is up there, Mr. Wren?

A. Yes, sir.

Q. The 1,200,000—

Mr. Nizer: Well, now, that seems to me—

By Mr. Sawyer:

Q. —at the bottom of the gross column?

Mr. Nizer: First of all, that is 34 pictures. I—you—

Mr. Sawyer: Well, you used 37 at one time and I just used 34.

Mr. Nizer: Oh, no, no. I didn't use 37. I made it very explicit and clear. He was awarded 37; he played 34 during the period of this litigation; and now you have given him the 37 beyond the period when His Honor has ruled a half dozen times at least on that.

I move to strike out that answer—

(6710)

Q. Let us take 37.

Mr. Nizer: —as a violation of Your Honor's direction.

By Mr. Sawyer:

Q. Let us take 34.

Mr. Nizer: No. Wait a moment. Not "Let us take." I have a motion pending.

The Court: Granted.

Mr. Nizer: May I have that stricken out?

By Mr. Sawyer:

Q. Now, on the 34 pictures that you played during the period, Mr. Wren, the ones out of the 37 that you got, you got 34, is that correct, that you played during the period?

A. Yes, sir.

Q. Out of the 87?

A. Yes, sir.

Q. And what was the gross that the Viking got on those?

A. $1,200,357.08.

Q. Now, what happened to the rest of the 87?

A. The defendants got 37 of those pictures.

Q. Well, they get all the rest of the—oh, 37 of those remaining. Very well.

And what was the—what gross did they get

(6711)

on the 37 that they got?

A. $2,900,650.

Q. Now, how many out of the 400—

Mr. Sawyer: And what is the total number, Mr. Nizer, 400 and what?

Mr. Steinberg: 468.

The Witness: 468.

By Mr. Sawyer:

Q. Well, out of the 468 pictures played first-run Philadelphia at all of these theatres during this period, how many enjoyed any weekly grosses in excess of 35,000?

A. I believe it was 14 pictures.

Q. Very well. Now—

Mr. Nizer: Now, just a moment, sir. I gave to Mr. Steinberg the list showing 20-odd instances, and he is checking it right now, and I think that you will find your computation is in error, and we gave him ours.

May we straighten it out right now and not waste time later?

Mr. Sawyer: All right. Now, my question is these are the number over 35,000.

Mr. Nizer: 34,000, whatever that gross is.

Mr. Sawyer: All right. We have 34,000 some odd dollars.

(6712)

Mr. Nizer: That is right.

Mr. Sawyer: Now, that—

Mr. Nizer: 24 instances of weeks above it.

Mr. Sawyer: That is right—weeks above it. I am asking about the number of pictures—

Mr. Nizer: 21 to 22, as I said originally, but since several weeks of these pictures were above 34—that is right, isn't it, Mr. Steinberg? There were 24 instances?

Mr. Sawyer: Your Honor, I think this is argumentative. My question to the witness is: How many pictures over $35,000 ever had a weekly gross over $35,000.

Mr. Nizer: And he says 14.

The Witness: 14 pictures.

Mr. Sawyer: And he says 14.

Mr. Nizer: I am telling you it is 24.

Mr. Sawyer: I believe that it is 14, Your Honor.

Mr. Nizer: Well, but I have given you the list. You can correct it.

Mr. Sawyer: Well—

Mr. Steinberg: You said 35,000.

Mr. Sawyer: I said 35,000.

Mr. Nizer: It is 35,000.

(6713)

Mr. Sawyer: Well, I said 35,000, because there are several pictures—

The Court: You mean there is a difference of 10 pictures?

Mr. Sawyer: Just a couple of—

The Court: $1,000?

Mr. Sawyer: A couple of hundred dollars. Yes, sir. That is exactly the reason.

Mr. Nizer: Well, but your gross is what at the—

Mr. Sawyer: Well, it is 34,000 six, whatever it is.

Mr. Nizer: Why do you say 35, if it is a couple of hundred dollars?

Mr. Sawyer: Because, Your Honor, I—we don't—the point would be that the gross is comparable—

The Court: Objection overruled.

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(6744)

Q. Do you submit to the Court and jury this chart entitled Schedule A to show anything whatsoever with regard to whether certain pictures should have been awarded to the Viking or not?

A. No, sir.

Q. This chart here is offered to show what, Mr. Wren?

Mr. Nizer: I object to that as not proper redirect. He has explained the basis of the chart on direct and we have had cross-examination. If he now gives another statement—

The Court: I will sustain the objection. The purpose of why he offered it, that is a question of proof. It is part of the plaintiff's case, the answer is.

Mr. Sawyer: I do not think I asked him just

(6745)

that, Your Honor. I took him through just what it did show, but I think it would be all right, Your Honor, to make it clear—

Mr. Nizer: Not on direct.

Mr. Sawyer: —what is it offered for?

The Court: Well, it is offered for the purpose, as stated here, to show the amount of damage claimed by the Viking.

Mr. Sawyer: Well, that is an ultimate conclusion. I was not going to ask him that, Your Honor. It was a more particularized point than that. And in that sense the chart speaks for itself. But I am not sure it is clear as to the way in which it purports to show that. Why does it show that that is the amount of damage?

The Court: I thought you had already done that?

Mr. Nizer: Yes, sir.

Mr. Sawyer: Well, I don't think, Your Honor, that I asked him this particular question.

The Court: All right. I will permit the question.

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(6746)

A. The Viking paid more for the film that it received than did defendant distributors.

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(6754)

The Court: Pardon me.

Rather than having any argument here, apparently, as far as my recollection is concerned, this is the first time that I have had the problem as to whether Schedule A is competent as an aid to prove a conspiracy, although I have already ruled that it is competent to go to the jury to prove damages, I would like briefs on that point.

I do not have to rule on it immediately. So therefore I would like to have the briefs by Friday morning, please. That will give you two nights.

So that we understand each other, what I would like to do, Mr. Sawyer, and one of the defendants, is to have Mr. Wren figure out the percentages.

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(6760)

By Mr. Sawyer:

Q. Mr. Wren, you recall that from time to time during the cross-examination Mr. Nizer proposed that this or that film might more properly have been removed from the gross or the film rental of any one of those particular theatres up there.

A. Yes, sir.

(6761)

Q. And if you remove a film from the calculation, do you have left the full 123 weeks of playing time on which this is based?

A. Of course not.

Q. And if you removed a film from the Viking Theatre would you have the playing time of 123 weeks intact?

A. No, sir.

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(6763)

The Court: Ladies and gentlemen of the jury, it is again my duty, as I see it, to caution you as to the weight to be given to certain evidence which you have just heard with respect to what we call Schedule A.

I remind you that you are the sole judges of the facts and the only questions which the Court decides are the questions of law in a case. As I said, you are the sole judges of the fact. However, a judge of the Court of the United States has a right to give the jury the benefit of his view as to the weight or worth of evidence. It is as true today as it was when it was said 300 years ago that the judge's comments may give a great light and assistance to the non-lawyers who make up the jury. Particularly is that true in a case as complicated as the present one.

I have permitted the plaintiff to show you his Schedule A. I have ruled that it was competent as evidence in the case. That schedule as revised and presented

(6764)

to you was built up from figures of the average gross box-office receipts, as you have heard, of the seven theatres owned by the defendant exhibitors and the actual gross less film rental realized by the Viking. All of these figures, of course, are limited to the period of the suit, July 2, 1954, to November 13, 1956. Now, I am talking about the figures only in Schedule A.

As worked out by the plaintiff, the average, I shall call it, adjusted gross, you will recall, meaning gross receipts less film rental, of the competitors, the average gross of the defendants works out to a figure which you have heard from the plaintiff. Defendants have endeavored to prove to you that those comparisons are meaningless.

The purpose of this instruction is to caution you that the comparisons for the average is not necessarily meaningful. That is, the fact that others grossed more than plaintiff does not necessarily mean that there was a conspiracy. Futhermore, if, and only if, there was unfair discrimination by way of an unlawful conspiracy, are you to consider the question of damages at all. As I shall instruct you more fully in due course in my charge, and I intend now to re-read this at the close of the case, the question of damages does not enter into your deliberations unless and until you have decided that the plaintiff has proved his

(6765)

charges of concerted and combined unfair discrimination.

The reason I have felt that I should caution you about this is that, of course, the figures were large, substantial is the plaintiff's contention, and it is for you to decide. But, as I said, I don't want you to consider the facts of the figures to think immediately because of the comparison here that there must have been a conspiracy. That is not proper any more as I indicated I think yesterday in one case, a boy was burned terrifically and he had burns all over his body and they had pictures of this transplanting in the hospital, motion pictures of the operation, and I decided that that would inflame the jury and it would prejudice the defendant. If you had ever seen those pictures you would have immediately come to the conclusion that, my, this boy should get a lot of money. And that is not true.

So with respect to the damages, the figures themselves should not be taken by you into consideration when you are thinking about the question of conspiracy or unfair discrimination.

If you decide that the defendants did combine, in violation of law, according to the principles I shall state in detail later, then you proceed to the question of damages. And if you do, then I caution you that the mere fact that plaintiffs adjusted gross was substantially less than the

(6766)

average figures for the defendants by no means fixes any certain figure as to the plaintiff's damages. I do not repeat the figure, but you will recall the plaintiff's Schedule A contained a substantial figure obtained by subtracting his adjusted gross from the defendants' average adjusted gross. There is no particular weight to be given to that figure simply because by the use of elementary arithmetic it happens to be the difference between the defendants' average and the plaintiff's actuality.

By way of illustration, suppose that I operate a clothing store and I bring an action against wholesalers and retailers with whom I deal or compete, as the case may be. The fact that the gross earnings of my competitors average out 40 per cent more than mine for a given period does not in itself indicate in any way that they indulged in unlawful discrimination against me. If, however, I had other proof that there was such discrimination, the fact of their greater earnings, if their businesses were comparable to mine, would be an additional link in a chain of circumstantial evidence. But before I could ever maintain that my resultant damage was 40 per cent of my gross, I should have to show that our businesses were comparable. And that is why I think I have to instruct you as to this while it is in your minds, are the theatres comparable. Again I say to you that that is up

(6767)

to you to decide; that is a fact that you will have to decide.

By comparable I mean, and I am going back to my clothing store, that I will have to show that our clothing stores were equal in size, location, reputation, attractiveness, and that I was the equal of the other proprietor in managerial ability, experience, reputation for prompt payment, that our merchandise was comparable and all other factors that make for commercial success.

Of course, no two theatres are exactly alike so that that is the difficulty in the case and that is why I have permitted the plaintiff to compare the Mastbaum which had 4000 seats with the Viking of 1000 because, as I said, no two theatres are exactly alike or in exactly the same location. So you have to make some comparisons.

Now, were all of the defendant theatres making up the average comparable? For one thing, admittedly, they had different seating capacities. We have heard that throughout the case. Admittedly, the Viking did not gross the first week of any run as much as other theatres because of this seating capacity.

Plaintiff answers that and says that seating capacity makes no difference since Viking could have long runs.

You have heard the testimony as to that.

Does seating capacity have real significance

(6768)

in your judgment? This is for you to decide as well as other comparisons between theatres.

The reason, again, as I said I am instructing you as to this is because we have seen the comparisons there, the figures. Are they comparable? That is for you to decide. I have permitted the plaintiff to show

you those figures for that purpose if you think that he has proven that point to your satisfaction.

As you saw, the comparison here on the figures was direct, average versus actual. There was no attempt made to choose comparable theatres. That is my recollection, but it is your recollection that counts. The nearest theatre, as I understand, was the Midtown. That was one of the seven, but I think I am right as to this, however, again, I repeat, and I will repeat it many, many times in this trial, it is your recollection that counts; you decide the facts. You have to take instruction from me as to the law. This is not any instruction as to the law except, as I have brought it to your attention, where I have repeated this as far as the facts are concerned, that is for your determination.

In my judgment, I have felt it necessary to give you this evaluation of Schedule A or grossing comparison illustrations. It is for you to determine what it proves. I am here not cautioning you so much that the

(6769)

evidence was of little weight as I am stating emphatically that it does not necessarily prove in itself—I am referring to the figures—that there was any unlawful action on the part of defendants.

Again, should you determine from all of the evidence that the defendants did discriminate unlawfully against the plaintiff, no figures which were shown you necessarily and conclusively proves what damage, if any, was sustained by plaintiff as a result of defendants' acts. It is merely a guide which the plaintiff has given you as to the comparisons which you may accept or reject for what you may consider it to be worth in the case.

You have an exception, Mr. Sawyer.

* * *

Mr. Sawyer: May I address the jury directly?

By agreement of counsel, in lieu of calling certain witnesses we will read excerpts from depositions thereof.

This is the deposition of HARRY WEINER.

(6770)

Q. You are employed by Columbia Pictures Corporation, Mr. Weiner?

A. That is correct.

Q. How long have you been employed by Columbia?

A. It will be 33 years this coming April.

Q. What is your present position with the company?

A. District Manager.

Q. In what district?

A. Covering Buffalo, New York State, and the Philadelphia area.

Q. Where is your office?

A. Located at 302 North 13th Street, Philadelphia.

Q. How long have you held that position and that title?

A. Since about 1947, approximately.

Q. When did you first meet Mr. Sley?

A. The first time I met Mr. Sley was, if my memory serves me correctly, on the occasion when we were going to release a picture called CAINE MUTINY.

Q. Will you tell me where the meeting took place and what happened at the meeting?

A. The meeting took place in my office.

Q. Who was present?

(6771)

A. A fellow by the name of Manning with Mr. Sley.

Q. Who was on your side?

A. I believe I was there alone.

Q. What was the purpose of that meeting?

A. Mr. Sley came in with Manning and displayed interest in CAINE MUTINY as an opening picture for him at the Viking Theatre.

Q. What else was said at that meeting?

A. I told them that we felt it was a very important property, had great potential boxoffice, and I had learned that in Chicago the exhibitor out there who was awarded the picture had put up a guarantee of $200,000 or $225,000.

Q. Who was that exhibitor?

A. I don't know.

Q. Did you suggest that they should put up a similar guarantee?

A. No, I don't tell anyone what to bid or offer.

Q. Did you tell them about any minimum terms?

A. No.

Q. Why did you mention $200,000 or $225,000?

A. Well, he was inquiring as to how I thought he could get the picture, and he was asking for my counsel and advice, and I just gave him an idea as to the importance of the picture and what someone else thought of it.

(6772)

Q. Was your mention of that figure of $200,000 or $225,000 intended to be in the nature of counsel or advice then?

A. That is right.

Q. Had you ever had any guarantee like that in Philadelphia before?

A. No.

Q. Are you familiar with the method used by your company in licensing its pictures in Philadelphia first-run since 1954?

A. I am.

Q. Will you tell me what method it was in 1954 and any changes that have come about since then?

A. It was on the basis of competitive negotiations.

Q. Will you describe for me what that means exactly.

A. Well, it affords every exhibitor an equal opportunity to compete for the same picture.

Q. Is that like bidding?

A. I would say the mechanics are about the same.

Q. Has that been the method used throughout that period in first-run Philadelphia beginning in 1954?

A. No, it was changed, I believe.

Q. When was the change?

A. In 1957.

Q. Will you tell me what the change was?

A. The change was definite forms that were sent out advising

(6773)

the exhibitors of the screening of the picture and giving them an opportunity to submit their offers in writing within a five-day period or a seven-day period.

Q. Apart from the forms, did the actual substance of the method change?

A. Actually, no.

Q. When you would receive the advice as to what the agreement between Stanley Warner and Goldman was, would you thereafter notice or have it come to your attention that the picture would play either at the Goldman house, if the division they advised you of was on the Goldman half, or at the Stanley Warner house, if they advised you it was on the Stanley Warner half of their own division?

A. Not necessarily. It could have played any of the other theatres.

Q. What was your next contact for the licensing of THE CAINE MUTINY in downtown Philadelphia?

A. There were offers submitted to us in writing by the Viking Theatre.

Q. Do you remember who else submitted offers in writing?

A. I don't recall.

Q. You do remember, do you not, that William Goldman Theatres did not submit a written offer?

A. He did not.

(6774)

Q. And it was not his practice to submit offers in writing for your produc[illegible]s it?

A. Not at the time [illegible]'AINE MUTINY.

Q. And it was not his practice to offer cash guarantees for your product at that time either, was it?

A. I don't recall.

Q. You do recall, however, that the Viking's written offer and the other written offers were rejected, do you not?

A. That is right.

Q. What was your next contact with the picture.

A. We negotiated for it and sold it to the Randolph Theatre.

Q. When you say "we," will you specify the individuals.

A. I mean the company.

Q. What individuals conducted the negotiation?

A. Lou Astor and I believe Lester Wurtele was present.

Q. Were you present?

A. No.

Q. Did they report to you on the negotiations?

A. I was familiarized with them when they were completed.

Q. What were you told about it?

A. I was told the term.

Q. There was no cash guarantee, was there?

A. No.

Q. And again there was no written offer, was there?

(6775)

A. Not that I know of.

Q. Do you remember that the Viking raised its bid after the first bids were rejected?

A. I do.

Q. Did you have a subsequent conversation with Mr. Sley?

A. No.

Q. So the Viking was going to open as an air-conditioned theatre and you knew that?

A. The intention was to open as an air-conditioned theatre, but there was some sort of strike or holdup with the air-conditioning people, as I recall.

Q. When you asked the Viking—

A. May I ask this question to you: When did they get the air-conditioning started in the theatre?

Q. You can ask it. I won't answer it.

So when you gave the opportunity to the Viking Theatre to make an offer on this picture, was that just a meaningless thing?

A. Not necessarily.

Q. Hadn't you made up your mind pretty much that they couldn't get the picture because you were doubtful about their opening?

A. That is not so. They still had a right to get the picture if they had put up—

(6776)

Q. How could they get the picture if in your mind you were doubtful about their opening in time for the picture?

A. If they would have put up sufficient front money, even though the opening might have been later, they might have gotten the picture.

Q. What was sufficient front money to take care of that contingency, in your estimation?

A. I would say that they would get a lot of definite consideration if they would have come up with about $125,000.

Mr. Sawyer: By Mr. Adams for the defense.

Q. Did you have any agreement or understanding with any distributor or any exhibitor to deprive the Viking Theatre of an opportunity to compete for and obtain first-run pictures in downtown Philadelphia?

A. No.

Mr. Sawyer: That completes the reading of the testimony of Mr. Weiner.

Although I didn't say this in connection with the reading of the deposition, of course, it is understood that the deposition is offered in the same light as the witness, i.e., as an adverse witness under 43(b).

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(6777)

Mr. Sawyer:

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This is the testimony of LESTER WURTELE.

Q. Mr. Wurtele, you are employed by Columbia Pictures Corporation?

A. Yes.

Q. For how many years?

A. Approximately 32 years.

Q. What is your position today?

A. My position today is Branch Manager of Philadelphia.

Q. How long have you held that position and that title?

A. For about seven or eight years.

Q. Prior to that what was your position with the company?

A. I was in the Sales Department.

Q. In Philadelphia?

(6778)

A. That is right.

Q. Has your position changed at all since you became Branch Manager?

A. Has it changed?

Q. Yes, either in title or duties.

A. No, I don't think so.

Q. What have been your duties as Branch Manager?

A. My duties are the supervision of the operation of the Philadelphia office, supervising the physical end of it as well as the sales end of it.

Q. Who tells you the company policy on how to license pictures in first-run Philadelphia?

A. The policy of how to license pictures for first-run Philadelphia?

Q. Yes.

A. I don't fully understand the question.

Q. Doesn't your company have some method of licensing its pictures?

A. Well, that is directed to me either through Mr. Weiner, who is my immediate superior, or from the home office.

Q. When you became Branch Manager who explained to you the methed of licensing pictures first-run Philadelphia?

A. I don't think there was any specific explanation at that time, because, as I explained to you, I have been with

(6779)

the company for a great many years, and the manner of sale, and so forth, was more or less familiar to me.

Q. Who was your predecessor as Branch Manager?

A. Mr. Weiner.

Q. Had you assisted him in licensing pictures when he was Branch Manager in first-run Philadelphia?

A. Yes, I had.

Q. What method was in existence when you became the Branch Manager?

A. At the time I became the Branch Manager we were offering our pictures under bidding. Whether at that time or shortly prior to that time, I couldn't be certain.

Q. Was that sealed bids?

A. The bids could have been submitted under seal or or they could have been brought in by an individual, in which case it might not be sealed in an envelope.

Q. Could it have been oral, too?

A. No, not if we were offering it under bidding.

Q. How long did that system of bidding continue?

A. Well, as I say, I became Branch Manager approximately in 1951, and, as I just explained, it was either during that period that we were bidding or immediately prior thereto, because it was in 1951 that we eliminated the offering of

(6780)

our pictures first-run Philadelphia under a formal bidding setup.

Q. And who explained to you that that was to be changed?

A. It was done either through Mr. Weiner or directly from the home office, I don't recall.

Q. When did you first hear, if you did, of the Goldman-Stanley Warner split in downtown Philadelphia?

A. They had made a request of us to split our product as between those two people, and we had told them that we did not intend or would not participate in the split of pictures. There were a number of discussions along those lines. They tried to prevail upon us to participate in it, which we wouldn't do, and eventually they took the position that they were going to split the product between

themselves, that is, in so far as deciding which pictures would go either way.

Q. Who from either Goldman Company or Stanley Warner first discussed it with you?

A. Well, it was mentioned to me, that is, it was discussed with me in an offhand way by George Beattie, I believe, from the Goldman office, and who it was with the Stanley Warner people at this point I don't recall. It may have been their film buyer or it may have been Ted Schlanger.

Q. How soon after you became Branch Manager were these

(6781)

discussions?

A. I couldn't answer the question to that extent to know exactly how soon or whether possibly it was before I became Branch Manager.

Q. You think it was that early, don't you?

A. I don't know. I say I don't know offhand.

Q. Had you heard of it by the time you were Branch Manager?

A No, I believe it took place after I was made Branch Manager.

Q. Soon after or years after?

A. I would say within possibly a year of that time.

Q. So you had heard of a Stanley Warner split within a year or so of your becoming Branch Manager, hadn't you?

A. Of their request for that, yes.

Q. Did they tell you they had it with Metro?

A. They said that they had splits with other film companies. Which ones they were, I don't recall.

Q. With whom did you discuss this within your company?

A. Well, I didn't discuss it any further, as a matter of fact. I believe that either Mr. Goldman or Mr. Beattie

or possibly both of them had visited our home office to discuss it.

Q. Did you get any report of what happened in the home office meeting?

(6782)

A. Only that our position remained the same, that we were not going to participate in the split, that we should proceed with the idea—

Q. Who told you that?

A. Mr. Astor.

Q. Proceed with the idea that what?

A. Proceed with the idea of trying to market our pictures to the best of our ability for the benefit of the company.

Q. Did Astor tell you that on the telephone or in a letter?

A. I can't recall. He may have told it to me in person.

Q. But Astor himself told you personally about it?

A. That is right.

Q. When they decided to split the product themselves, how did that arrangement work?

A. How did it work?

Q. Yes.

A. Well, I can't answer how they did the splitting.

Q. What did they tell you after they had split the pictures?

A. Well, they would tell me that they had decided that certain of our pictures the Goldman people would be interested in buying and certain pictures that Stanley Warner people would be interested in buying.

Q. And that they wouldn't cross over—

A. They said they wouldn't compete with each other for

(6783)

those pictures.

Q. Let me read you the question and answer in George Beattie's deposition recentely taken in this case:

"Q. Who was the individual at Columbia with whom the split was worked out?

"A. Lou Astor was the individual that made the split or the division of product at Columbia."

Is that correct? Is it correct?

A. You mean the answer that Beattie gave, whether it was true?

Q. Yes.

A. It couldn't have been correct.

Q. Could it have been correct without your knowing it?

A. Without my knowing it?

Q. Yes.

A. Oh, I question that very much. I don't think any such arrangement would be made without my being told.

Q. Later he said, "Astor only made pictures as far as Warner and ourselves were concerned on a division."

The question following that:

"Q. Did Wurtele know about that division being made by Astor?

"A. I believe so."

(6784)

That is so?

A. I gave you my answer.

• • •

(6786)

THIRTY-EIGHTH DAY

• • •

(6788)

Mr. Sawyer: I continue, Your Honor, with the reading of the deposition of Mr. Wurtele, Branch Manager, Philadelphia, Columbia Pictures.

This is page 45.

Q. What was your first contact with Mr. Sley?

A. I believe the first contact I had with him was that he came in the office one day prior to the opening of the theatre.

Q. Was he alone?

A. No, I believe Mr. Manning was with him. In fact, I think Mr. Manning brought him in and introduced him.

Q. Did you have any discussion with them?

A. No, I didn't. They basically came in to see Mr. Weiner.

Q. You didn't attend that meeting?

A. I believe I was present at least during a part of the time, yes.

Q. What was the substance of the discussion at the meeting with Mr. Weiner?

A. The substance of the discussion at the meeting was that they intended to open the theatre shortly, and, naturally, they were interested in any important pictures that we had, and they knew "The Caine Mutiny" was to the available shortly

(6789)

and wanted to discuss the possibility of negotiating or buying the picture.

Page 55.

Q. In this Plaintiff's Exhibit 107 Mr. Josephs tells Mr. Weiner that he spoke to you about screening "Caine

Mutiny" for the Viking and says, "This exhibitor will have the same opportunity to make an offer on that picture as the first-run exhibitors." Now, isn't it true that the Viking did not have the same opportunity as the Randolph and the Stanley?

A. Certainly they had the same opportunity.

Q. But they were being held to a written commitment, were they not, whereas the Randolph and Stanley were not?

A. They were requested to make a written commitment, yes.

Q. So there was that difference?

A. In that sense, yes.

Q. Did someone advise you that between themselves Stanley Warner and Goldman had agreed that this was to be on Goldman's half of the split?

A. I don't recall that that was so at the time.

Q. Didn't you find that out?

A. I found it out because the Stanley Warner people expressed no interest in the picture and said they weren't

(6790)

interested in the picture, and that was, in effect, telling us that that was the case.

Q. So you understood that to be part of that arrangement you have described previously whereby they would divide the pictures?

A. That is correct.

Q. Plaintiff's Exhibit 108 indicates, does it not, that the only original written bids received by your company on "The Caine Mutiny" first-run Philadelphia were from the Studio, Arcadia, and Viking Theatres?

A. Well, actually, I think the word "bid" in there is used very loosely. As a matter of fact, they weren't bids; they were offers.

Q. Offers, then.

A. Yes.

Q. The only written offers?

A. According to this?

Q. Yes.

A. According to this, that would be so.

Q. Were you negotiating with the Randolph Theatre before you received this notice of rejection?

A. As a matter of fact, on this picture I didn't conduct the negotiations for the picture.

(6791)

Q. Were you present during the negotiations for the picture?

A. I believe I was, yes.

Q. Who conducted the negotiations?

A. Mr. Astor.

Q. Lou Astor?

A. That is right.

Q. To the best of your recollection, where did those negotiations take place?

A. I believe they took place in Goldman's office, that is, at least at the time I was present. If they had any other negotiations in New York, I wasn't present.

Q. Did you hear of any other negotiations in New York?

A. I don't recall at this time.

Q. Who was present on Goldman's side in his office when you were present?

A. George Beattie and Goldman.

Q. Anyone else?

A. Not to my recollection.

Q. When did this take place?

A. I wouldn't know exactly, but I believe it was after this period of time.

This is continuing. Page 58:

(6792)

Q. How soon after you had sent the notice to Goldman asking him to express an interest in the picture?

A. I couldn't say with any degree of certainty when we actually negotiated with him.

Q. Who first told you from the Goldman organization that they were interested in the picture?

A. George Beattie.

Q. And when did he tell you?

A. He told me shortly after he received notice of the screening of the picture.

Q. How soon after he told you that did you go about working out a deal with them?

A. It was sometime subsequent to that, because we had to give consideration first to any offers that would have been made.

This is 65:

Q. Did you get a cash guarantee from Stanley Warner on "The Solid Gold Cadillac"?

A. Yes.

Q. Was it $25,000?

A. That is my recollection.

(6793)

Then there was marked a copy of the contract for SOLID GOLD CADILLAC between Columbia and Mastbaum.

Q. Will you look at P-109. Is that the contract or a copy of it for "Solid Gold Cadillac"?

A. It appears to be.

Q. Does it mention a guarantee?

A. No, it does not.

Q. Can you explain why that was omitted from the contract?

A. I can't explain why it was omitted from the contract, because I did not finalize this deal. I know that I was told that part of the agreement was that were was to be a $25,000 guarantee. While it did not appear in the

face of the contract, that was the agreement and it was so billed.

Q. Were you told it was not to be on the face of the contract?

A. That is right.

Q. Who told you that?

A. Mr. Weiner.

Q. Did he tell you why?

A. No, he did not tell me any specific reason why, except the fact that it was not to be there.

Continuing on page 67:

(6794)

Q. Was "Solid Gold Cadillac" another one on which the company's thinking was that it wanted a big theatre?

A. I don't believe so.

Q. What did the Viking offer you on that?

A. I don't recall offhand.

Q. Did you negotiate with Jay Wren on this picture?

A. No, I did not.

Q. Were you present at any such discussion with him?

A. My recollection of the situation was that Jay had either written a letter or told me that he was interested in "Solid Gold Cadillac", and I asked him to come into the office for the purpose of discussing it. He did not come in, and I believe we both went in to Mr. Weiner, who has a great interest in first-run negotiations and the setting of pictures—

Selling.

Mr. Adams: Yes, it must be selling.

A. (Continuing) and the selling of pictures, and in doing so Jay said, "Well, you know I am interested in the picture, but rather than sit down and spend a lot of words in conversa-

(6795)

tion, I prepared an offer for you which I am leaving with you," and he handed it over.

Q. What did you and Weiner say?

A. I believe Weiner examined the bid, and I looked at it—the offer, rather—and then Mr. Weiner spoke him from that point on, and my recollection is that he told them that he felt that on a picture of this caliber, that his chances of getting the picture would be greatly enhanced if there were a guarantee stipulated, and I believe he also mentioned to him that the company might be concerned about the fact that we had heard of some litigation in connection with monies that were supposedly due or alleged to be due to other film companies on previous offers that had been made, and he suggested to Jay that if he was anxious to play the picture, that he try to figure out in his mind what he felt would be a reasonable, proper guarantee for the picture and incorporate that as part of his offer.

This is page 71:

Would you mark as Plaintiff's Exhibit 112 a copy of a telegram from Bernie Brooks of Stanley Warner to Harry Weiner of Columbia.

(6796)

Your Honor, this is page 70. It is now P-64 in our list and I would like to read that telegram at this juncture, since it is what is referred to here.

It is a telegram addressed to Harry Weiner, Columbia Pictures Corporation, 302 North 13th Street, Philadelphia:

"I have been advised by your home office that the deal on SOLID GOLD CADILLAC has been approved for the Mastbaum Theatre beginning October 10. We are advertising this picture for the Mastbaum Theatre.

"Bernie P. Brooks

"Stanley Warner Management Corporation."

This is 1956, August 15, P.M., 4:17.

(6797)

Q. Would you look at that telegram. What is the time indicated on the telegram and the date?

A. The time of the telegram is August 15, p.m., 4:17.

Q. Bernie Brooks was an employee of Stanley Warner Management Corporation?

A. That is correct.

Q. And he advises Mr. Weiner in this telegram—1956 is the year, isn't it?

A. I couldn't see it very well, but I guess it is.

Q. At this time on this date he advises Mr. Weiner that he has been advised by your home office that the deal on SOLID GOLD CADILLAC has been approved by the Mastbaum Theatre beginning October 10. "We are advertising this picture for the Mastbaum Theatre." Isn't that true?

A. That is what is stated here, yes.

Q. But the contract was not prepared until August 20; is that correct?

A. That is the date of the contract.

Q. How much time was Mr. Wren given to try to get in touch with Mr. Sley and advise you on whether or not they would give a substantial guarantee on the picture?

A. I don't think there was any time involved specifically. I think he said that he would not offer a guarantee, that he would get in touch with Mr. Sley and discuss it with him and

(6798)

let us know.

Q. What I mean is, between his being advised that he ought to try to get a guarantee and his being told that the picture had been sold to Stanley Warner for the Mastbaum, how much time elapsed?

A. I couldn't say. Possibly from the morning until the afternoon, according to this memorandum.

Q. And the picture was not to open until October?

A. If that is the date that it was offered for.

Q. Who conducted the negotiation in the home office with Stanley Warner for this picture?

A. I do not know.

Q. Do you know who negotiated for Stanley Warner?

A. Mr. Weiner.

Q. I mean for Stanley Warner. He wasn't working for Stanley Warner, was he?

A. I don't know.

Q. Was it Mr. Brooks?

A. I wouldn't know except that he says here he has been advised by the home office.

Q. Did you ever attend any meetings where it was negotiated with the Mastbaum?

A. Where this was negotiated?

Q. Yes.

(6799)

A. No.

Q. Were you told on this picture that it was on the Stanley Warner side of the split?

A. I couldn't recollect at this time. I would only be assuming.

Q. Would you assume that you were told that?

A. I would assume so.

* * *

(6808)

Q. Now, the picture PHFFFT kas a Judy Holiday picture?

A. Judy Holiday.

Q. Did you have any part in negotiating for the licensing of that picture?

A. Yes, I believe so.

Q. Was anyone with you?

A. I don't recall at this time.

Q. With whom did you deal in licensing it?

A. I believe I dealt with George Beattie.

Q. Any other exhibitors?

A. Well, it was licensed to one of the Goldman Theatres.

Q. Did you negotiate or deal with any other exhibitors before it was licensed to the Goldman Theatre?

A. I don't recall having dealt with anyone else.

Q. Was that expected to be a good picture when you licensed it?

A. I hoped it would be, yes.

Q. According to this notation on the cut-off card, that is Release No. 715, is it not?

A. That is correct.

Q. And there is a typed note about No. 715, which reads as

(6809)

follows, in part:

"To be played commencing November 24 following the engagement of WHITE CHRISTMAS. If WHITE CHRISTMAS plays the Randolph Theatre beyond November 23, PHFFFT is to play the Goldman Theatre instead of the Randolph. Play date on the Goldman Theatre to include Thanksgiving."

Is that right?

A. That is correct.

Q. So you gave them the choice of theatres?

A. Actually not. What we were seeking was to make sure that the picture opened to include a holiday.

Q. That was more important than getting it into a big theatre?

A. We felt it was much more important than permitting it to play at some time that might be of less value to us, yes.

Q. What was your Christmas release that year?

A. I don't know that we had any release as such for Christmas. I don't recall.

Q. Would there be any record you could refer to which would help you to recall that?

A. We don't ordinarily set up releases, I mean on our release schedule, for a specific day. They are generally set up just for the month of release.

(6810)

Q. Do you have a printed release schedule?

A. We do.

Q. Would you have it here, the printed release schedule of your company for the 1954-1955 season?

A. No.

Q. Wouldn't that have been sent over with your other first-run records?

A. No, it would have nothing to do with first-run. It is a printed schedule that covers maybe a year's product or maybe ten months' product at a time.

Mr. Sawyer: P-67, furnished by defendant, is entitled "Schedule of Releases Through December, 1954." I will read this listing.

"PHFFFT. Robson, Judy Holiday, Jack Lemmon, Jack Carson, Kim Novack. Running time in minutes: 88. Month of Release: December."

That, Your Honor, with the offer made, concludes the reading of the deposition of Mr. Wurtele.

The Court: Very well.

Mr. Sawyer: There are a number of exhibits, Your Honor, but consistent with what I have done before, rather than select these now I will offer at the end and then there

(6810a)

will be an opportunity I think to eliminate some to cut down on the actual number on Columbia.

I call Mr. Tunick.

(6811)

EUGENE TUNICK, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Sawyer:

Q. By whom are you employed, Mr. Tunick?

A. United Artists Corporation.

Q. By whom were you employed in the period from the middle of 1954 to November, 1956?

A. In the middle of 1954 I worked for Audio Controls Corporation. I joined United Artists in December of 1954, and through 1956 I was with United Artists, and I still am.

Q. In what capacity, sir?

A. Branch Manager of the Philadelphia office.

Mr. Sawyer: The witness is offered, Your Honor, as an adverse witness under 43(b).

The Court: Very well.

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(6815)

By Mr. Sawyer:

Q. Now, Mr. Tunick, were you familiar with the existence of an agreement first-run Philadelphia under which Goldman Theatres and the Stanley Warner Theatres would not compete with each other for your product?

A. I was aware that Stanley Warner and Goldman were not bidding against each other. However, that didn't affect me in any way, because my pictures were made available for all theatres in the city so they all had an equal opportunity to obtain the pictures.

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(6816)

Q. Did anyone explain to you, Mr. Tunick, of the existence of the split, Philadelphia?

• • •

The Court: Well you say you knew of the split. How did you operate within it?

The Witness: I made pictures available, a like amount of pictures, and also of equal quality, to both Stanley Warner and to Goldman.

These pictures were also made available to all other theatres in town, and all pictures were then put out for bid.

By Mr. Sawyer:

Q. And on the product that you made available for Goldman it is your understanding that Stanley Warner would not seek?

A. That is correct. Stanley Warner would not seek those.

Q. And vice-versa?

A. That is correct.

Q. Did you keep a list of pictures that you so divided on

(6817)

the basis of equal amount and equal caliber?

A. What I did was, after a division of product was made, whether it was three pictures, six pictures or twelve pictures, I had that on a scrap of paper, and I eventually compiled all those notes and put them all on one slip of paper.

Q. So you made a list?

A. Yes.

Q. Well, that is all I wanted to know.

Now, during this period did Goldman ever competitively bid for United Artists product?

A. Never submitted a bid to my knowledge for any United Artists pictures.

• • •

Q. If there were other bidders for a picture and those

(6818)

bids were rejected were there occasions when you negotiated the picture to the corporation on whose side of the split the picture had fallen?

A. Yes, Mr. Sawyer, I negotiated with either Stanley Warner or Goldman or all other theatres in town, including the Viking Theatre.

As a matter of fact, Mr. Sawyer, the Viking got most of our pictures.

Q. Now, Mr. Tunick, is it possible that when you so negotiated after rejection of the bids there were times when you told the corporation with whom you were negotiating that they would have to top the rejected bid?

A. I don't believe that was ever so. It may have been, but I doubt it very much.

(6819)

Q. Is it possible?

A. Yes. It is possible.

• • •

(6820)

Mr. Ward: Just a minute, Mr. Tunick.

I object, sir, to any reference to the picture ROMEO AND JULIET.

There was a previous attempt in the case to introduce evidence as to this picture to which I think it was I who made objection on the ground that the picture was not within the 87 pictures for which the Viking Theater ever offered a bid or negotiated, and Your Honor at page 2786 of the record sustained the objection, and if Your Honor should care to have me read

the excerpt dealing with that subject, I shall be glad to do so. It is a rather long colloquy.

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(6824)

Mr. Ward: Now, if Your Honor pleases, I am most reluctant to have to reargue this matter so frequently, but I apparently have no choice.

Your Honor will recall the definitive, thoroughly considered rulings that Your Honor made on June 13, which were nine in number, after a thorough argument and briefs, and on page 3349 Your Honor ruled as follows:

"I have added to No. 8, availability, as No. 9, change of playing time, and as to those two my ruling is the same, that all testimony as to those two—that is, availability and change of playing time—should be limited to the pictures sought by the Viking."

And it was then pointed out during the course of that argument that there were only 87 that could possibly fall in that category—ROMEO AND JULIET is not within it—and I think it is crystal clear based upon well-considered arguments heretofore made that ROMEO AND JULIET simply isn't within the orbit of this case.

The Court: Well, according to your pretrial, Mr. Sawyer, you have the matter of an adjustment here.

Mr. Sawyer: Well, that part of it, Your Honor, is—

The Court: Undoubtedly out. Then you also have

(6825)

the termination of the playing time.

Mr. Sawyer: Yes, sir. That is part of it.

The Court: I will sustain the objection.

Mr. Sawyer: Well, Your Honor, I better make an offer of proof, I suppose, on this.

The Court: Very well.

(At the side bar:)

Mr. Sawyer: Your Honor, I don't see how anybody could show this conspiracy operating, Your Honor, with these rulings. I mean, this so most barefaced treatment that never would have been accorded us in this picture.

Mr. Ward: Well, that is an extravagant statement, Your Honor. I shan't attempt to reargue it now.

The Court: Yes, I can understand that.

Mr. Sawyer: Of course, it is rhetorical, but it is most discouraging, Your Honor. I don't see how counsel could prove a conspiracy unless you can show the things that they did for others as against the things they did for us.

Mr. Ward: Well, we have been all over that.

Mr. Sawyer: That is the gist of it, the essence of it, I think.

The Court: I understand your feeling, Mr. Sawyer, and you certainly may be right, but to save time

(6826)

I have to decide these questions—

Mr. Ward: Yes, sir; sure.

The Court: —as I see them.

Mr. Ward: We are here for an offer of proof, understand.

Mr. Sawyer: I don't reproach you for that, understand, Your Honor. I just say that counsel—it is

most disheartening, really, to get a witness on—there is almost no case left.

Now, I offer to show that there was a contract for ROMEO AND JULIET that was entered into in January of 1955; that that contract contained a six weeks' commitment; that it was the policy of the United Artists also to have their pictures play on availability as close as possible; that that picture didn't open to the Midtown Theatre until May, 1955.

I offer to show a—the permission to play a picture that many months later and also to show that the time that Goldman made his bid for COUNTRY GIRL on a specific date he was committed by contract to United Artists. This is the picture that we have talked about before in that respect.

But, furthermore, after that change that Goldman Theatre did not abide by its six weeks' commitment;

(6826a)

he didn't—nor did he pay the film rental he agreed to pay. He was in default in the sum of $2423.57, which was never paid, and United Artists didn't — never brought suit against Goldman, although they said they were considering it as late as the taking of this deposition—the statute of limitations, of course, you can take judicial notice, has now run on any such claim—and that they proceeded with no suit against Goldman whatsoever, although they did sue the Viking for film rental. Now, that is—

Mr. Adams: You don't mean to suggest that, Mr. Sawyer.

The Court: Well, just a minute.

Mr. Adams: Oh, I just wanted to correct a practical matter.

Mr. Sawyer: That is it. Now, he didn't pay the film rental; he cut the thing on change of availability,

and they didn't sue him. That is it on ROMEO AND JULIET.

Mr. Adams: I just thought that Mr. Sawyer had inadvertently made a mistake, Your Honor. I don't want to answer that, what he said, that the UA had sued the Viking. I am sure he didn't mean to say that.

Mr. Sawyer: Well, they did sue them.

Mr. Adams: For film rental?

(6827)

Mr. Sawyer: I have a note here, $8100 for film rental. Didn't they sue us?

Mr. Adams: That is a mistake. However, I don't know.

Mr. Sawyer: Didn't United Artists sue us?

Mr. Adams: No.

Mr. Sawyer: Well, everybody else says. I am sorry.

The Court: Yes.

Mr. Adams: Well, I don't want to make an issue of it.

Mr. Sawyer: Well, I will strike it.

Mr. Ward: The offer even as modified is objected to not only for—

Mr. Sawyer: Look, do we have to have—you have been sustained. We are just burning up time with record stuff.

Mr. Ward: All right.

Mr. Sawyer: Mr. Ward, it has been sustained.

Mr. Ward: All right.

The Court: Yes. Sustained, because what you have said is what I read in the pretrial.

* * *

(6835)

By Mr. Sawyer:

Q. Now, Mr. Tunick, you testified that there were written bids on the picture SUMMERTIME from the Viking, the Arcadia, and the World; is that correct, sir?

A. Yes, sir.

Q. And were all those bids rejected?

A. All the bids were rejected.

Q. And was SUMMERTIME negotiated to the Goldman Theatres?

A. After the bids were rejected, we negotiated with all theatres in first run Philadelphia and—

Q. And—

A. —received offers from them and then licensed the picture to the Randolph Theatre.

Q. And you don't mean that you—after bids were rejected you negotiated with the Viking, do you?

A. Yes, sir. I did negotiate with the Viking. I negotiated with the Arcadia and with the World.

Q. And when did you negotiate with the Viking?

(6835a)

A. Immediately, immediately after the rejection letter had gone out.

Q. Where did you negotiate with the Viking?

A. Over the telephone.

(6836)

Q. And with whom?

A. With Jay Wren.

Q. Do you have a record of such negotiation?

A. I believe there is.

Q. Do you have it with you, sir?

A. No, I don't.

Q. What kind of a record is it?

• • •

Q. Mr. Tunick, you were questioned at length about the motion picture SUMMERTIME in the deposition, your deposition that was taken in this case, were you not?

A. Yes, sir.

Q. And you there at that time were shown the documents that had been produced from United Artists with respect to the motion picture SUMMERTIME?

A. Yes.

Q. And you were shown, for instance, what has now been marked P-76. I show you P-76. You were shown that in your deposition, were you not, sir?

A. If you say so, Mr. Sawyer.

Q. Do you recall?

(6837)

A. I recall looking at memos similar to this, yes, sir.

Q. And what is that memo?

A. This is a memo, interoffice memo from m[illegible]f to Herb Wappus who was in the Contract Department in New York.

Q. What does it say?

A. It says, "Re SUMMERTIME," it is dated July 14, "Viking Theatre, Philadelphia, Arcadia Theatre, Philadelphia, World Theatre, Philadelphia. Attached you will find bids on SUMMERTIME first-run Philadelphia plus a copy of a bid from the World Theatre."

Mr. Nizer: Read on.

The Witness: "Recommend rejection and we will negotiate locally."

By Mr. Sawyer:

Q. And is there something crossed out?

A. Yes.

Q. What does it say before it was crossed out, the typing?

A. "No recommendations."

Q. And when you read "Recommend rejection, will negotiate locally," is that in handwriting?

A. That is not my handwriting.

Q. Did you think I asked you whether it was yours, Mr. Tunick?

(6838)

A. I thought you said so.

Q. No. I said is that in handwriting.

A. Yes.

Q. In whose handwriting is it?

A. I don't know.

Q. Was that memo sent to New York over your initials?

A. My initials do not appear on this memo.

Q. Isn't there an ET at the bottom?

A. Not on this copy that I have.

Q. I thought there was. Maybe I am mistaken. May I see it, sir?

(Document is handed to counsel.)

By Mr. Sawyer:

Q. Isn't this a GT? Isn't that GT:MRN? Doesn't it indicate you dictated that, GT?

A. Yes. I thought you said are my initials—

Q. ET are your initials, aren't they?

Mr. Ward: You are talking about handwriting, you see. I thought that is where you misled the witness.

Mr. Sawyer: I didn't mislead him. I thought he misunderstood.

The Court: All right.

By Mr. Sawyer:

Q. You dictated that memo, did you not, sir?

(6839)

A. Yes.

Q. To be sent to Mr. Wappus in New York?

A. That is correct.

• • •

(6842)

Q. Mr. Tunick, is it your testimony that on this memorandum that you dictated to your superior in New York with regard to the film SUMMERTIME, that someone unknown to you crossed out the words "No Recommendation" and put in in handwriting "Recommend rejection and we will negotiate locally"?

A. Mr. Sawyer, this is not a recommendation to a superior.

(6843)

This is an interoffice form to a clerk in the Contract Department. The other part is, this could have been my secretary, it could have been given to her over the phone, as many times I do, it could have been change of mind decision and a subsequent memo typed up. I don't recall exact circumstances surrounding this "Recommend rejection and we will negotiate locally."

Q. Was it your recommendation even though not in your writing?

A. It was my recommendation.

Q. Very well. Are you telling me also that you make recommendations to this clerk in New York, contract clerk in New York—is that who this recommendation is made—

Mr. Ward: That is not his testimony. He did not say he made recommendations to a clerk. He said that the document was sent to a clerk in the Bidding De-

partment or some such statement as that, not that he was making recommendations.

By Mr. Sawyer:

Q. Well, you do make a recommendation. don't you? This makes a recommendation, doesn't it?

Mr. Ward: But you said "to the clerk."

The Witness: I think the document speaks for itself.

(6844)

By Mr. Sawyer:

Q. Well, does it make a recommendation?

A. Yes.

Q. All right. Then do you make recommendations to clerks in the Contract Department in New York?

Mr. Nizer: That is not what he said.

By Mr. Sawyer:

Q. Do you?

A. It is a mere form that all contracts go to the Contract Department and they then take them up with the superiors in the home office.

Q. And following that did you receive P-77, which is a letter addressed to you from Mr. John Hughes?

(Document is handed to the witness.)

The Witness: Yes.

By Mr. Sawyer:

Q. And does that letter accept your recommendation that you should negotiate locally, reject the bids and negotiate locally?

A. He doesn't say that he is accepting my recommendation.

Q. Why don't you read it, Mr. Tunick?

A. "We are returning attached hereto rejected your copies of the bid deals which have been submitted for SUMMERTIME by the Viking, Arcadia and World Theatres,

(6845)

Philadelphia, Pennsylvania, first-run. Please negotiate locally for the sale of the picture in this situation. Kind regards, Sincerely."

By Mr. Nizer:

Q. Who signed that?

A. John Hughes.

By Mr. Sawyer:

Q. Who is Mr. Hughes?

A. He was the head of the Contract Department.

Q. So that the result of this exchange was that the Contract Department in New York accepted a recommendation which appears in handwriting in this original P-76; is that correct?

A. That is correct.

Q. And what was it, do you recall now, that led you to change your recommendation from "No Recommendation" to "Recommend rejection and negotiate locally"?

A. I don't recall that there was any change of opinion. It could have been a clerical error that my secretary made, and this might even be her handwriting, where I told her to correct it and recommend rejection and we will negotiate locally.

Q. You don't recall, in other words, whether you changed your mind or whether or not the original typing was in error?

A. I don't believe I changed my mind.

(6846)

Q. In other words, your recollection is that you intended this handwritten notation at the time you dictated it?

A. That's correct.

Q. And when you said to your secretary, "Recommend Rejection of Bids and Negotiate Locally," that for some reason she typed it "No Recommendation."

A. I am just presuming that is what happened, Mr. Sawyer.

Mr. Nizer: It wasn't typed. Is that a printed form? I beg your pardon for the interruption but I object to stating she typed in something.

Wasn't that a printed form?

Mr. Sawyer: No, it is typed.

Mr. Nizer: I thought it was part of the printing.

Mr. Sawyer: It is typed.

May I show this to the jury. Your Honor? It has now been read and it is in evidence. I will show them a copy.

(Document is handed to the jury.)

By Mr. Sawyer:

Q. The only printing is the "Office Rushgram" at the top, isn't it, Mr. Tunick? That is the only printing on the form, just the heading at the top, the rest is typed, is it not?

A. That is correct.

* * *

(6851)

Q. Will you read the letter, please, Mr. Tunick.

A. Do you want me to read it?

Q. Yes.

A. It is:

"Re Viking Theatre, Philadelphia.

"Dear Sir:

"This is to advise you that all bids submitted on SUMMERTIME have been rejected for the reasons that the terms offered are unsatisfactory.

"We, however, will afford you an opportunity to negotiate for this picture and will communicate with you in the near future, and we will likewise do the same with other theatres.

"We want to thank you very much for your interest in this subject.

"With kindest regards,

"Sincerely,

"Gene Tunick
"Branch Manager."

Q. Is that a form letter there that you have there; is it typewritten or is it printed?

A. This is a form letter with the necessary information typed in.

(6852)

Q. And the necessary information that you are referring to is what?

What portion of that form letter, which is a printed letter, is typed in?

A. The information that is typed in is the name of the exhibitor whom we are writing. In this case it is Mr. Wren at the Viking Theatre. And it is re the Viking Theatre and the name of the picture is mentioned.

Q. And all the—

A. We have this form.

Q. And all the rest that you read then is just part of the form, is it not, sir?

A. It is part of the form, because this is a standard procedure and a method of operation that we operate under.

Mr. Nizer: The Viking Theatre admits to receiving this, doesn't it?

Mr. Sawyer: Certainly.

Mr. Nizer: All right.

Mr. Sawyer: That is an interesting interlude.

By Mr. Sawyer:

Q. P-77 is also a letter of United Artists Corporation, is it, to you?

Oh, you already have that one there.

A. Yes.

(6853)

Q. We have been through that one.

A. Yes.

Q. I am sorry. 77. Then 78.

Then as to your deposition you were then shown P-78, which is the license on SUMMERTIME to the Randolph Theatre from United Artists; is that correct?

A. This is not correct.

Q. Well, that is the—all right.

It is the adjustment form, is it not?

A. This is a—

Q. That is an adjustment form?

A. —change of contract.

Q. And you were shown the Viking bid on SUMMERTIME, which is now P-74?

A. This is an application, copy of application. I don't know if this is—

Q. It is the Viking bid, is it not?

A. Yes, that is one of the copies of the Viking bid.

Q. Now, here is the P-75 which you were shown and this is the license with the Rondolph Theatre, is it not?

A. This is—that is correct, Mr. Sawyer. This is a license for the picture SUMMERTIME in the Randolph Theatre.

Q. Do you now testify that there is a document, Mr. Tunick, that indicates that you, after rejection of

(6854)

these bids, got in touch with the Viking about negotiating for the picture?

A. I said I thought there was a memorandum, yes.

Q. At the time of your deposition had your company produced all of the records having to do with the licensing of SUMMERTIME first-run for your company?

Mr. Ward: That is objected to, if Your Honor please.

Mr. Nizer: This is not at all competent.

Mr. Ward: This man is a witness and could not know what counsel might have done, but I represent to the Court that all of the documents for which demand had been made by the plaintiff on United Artists, including this document which is the subject of the present interrogation, were produced to counsel for the plaintiff.

By Mr. Sawyer:

Q. Aside from Mr. Ward's representation, Mr. Tunick, as far as you know all documents having to do with SUMMERTIME were produced by your company in response to the request of the plaintiff?

A. Mr. Sawyer, I didn't handle the personal transfer of the documents

Q. Well, you had to do, I suppose, with getting them, did you not? They were in your custody as Branch Manager for

(6855)

Philadelphia?

A. It was requested by our counsel to have the records brought to some office—

Q. That is right.

A. —and I transmitted that information to I believe the Office Manager, and that is what was done.

Q. That was done, was it not?
A. Yes, sir.

• • •

(6857)

Q. Is this the document that you are referring to?
A. Yes.
Q. Is that your handwriting (indicating)?
A. Yes.
Q. What are the words on there that pertain to the Viking?
A. "The same offer."
Q. Is there any other word?
A. Not pertaining to Viking.
Q. Now, at the time that you rejected or recommended the rejection of the Viking bid on SUMMERTIME the Viking was playing your picture NOT AS A STRANGER was it hot?
A. That is correct, sir, Mr. Sawyer.

• • •

(6859)

Q. Isn't it true that at the time that you rejected the bids on SUMMERTIME your company was earning from the exhibition of one of your motion pictures at the Viking the highest film rental that your company had up to that time enjoyed first-run Philadelphia from any motion picture—

Mr. Ward: That is objected to, sir.

By Mr. Sawyer:
Q. —by the defendant exhibitors.

The Court: Overruled.

Mr. Ward: Will Your Honor hear the reasons, sir?

The Court: Well, I think you have stated them, haven't you?

Mr. Ward: All right.

The Witness: Mr. Sawyer, NOT AS A STRANGER was only in the second week. I didn't know that it was going

(6860)

to be one of the highest, or that it was the highest. It was still playing. In fact, it had just started.

By Mr. Sawyer:

Q. And those two weeks—the second week had been completed by July 12, had it not?

A. If you say so.

Q. And this rejection took place July 12. Is that when you wrote that memo, or the 14th, in fact, was it not, and you got confirmation to reject it July 15?

A. The written confirmation was on the 15th.

Q. When did you write to the Viking that form letter that you have there?

A. You will have to indulge me, Mr. Sawyer. I have so many documents here.

On the 14th.

Q. When was the license to the Randolph?

A. The license contract was dated July 19.

Q. All right. At that time the Viking had had almost four weeks, had it not, performance on NOT AS A STRANGER?

Mr. Nizer: When the deal was made?

Your Honor, we object to that. Obviously the deal was made before.

Mr. Sawyer: Can't he stop prompting the witness, Your Honor?

(6861)

The Court: Well, I have to say, Mr. Sawyer, that I cannot see the purpose of this.

Sure, NOT AS A STRANGER, say it played three or four weeks. How many weeks did it play ten or twelve, didn't it?

Mr. Sawyer: It is the first weeks, Your Honor, that show what the picture will do.

The Court: It is your contention that NOT AS A STRANGER on July 19th was grossing so much that United Artists ought to have taken that into consideration and awarded this picture SUMMERTIME to the Viking?

Mr. Sawyer: Why, certainly. They say that prior performance is important, that the performance at the theatres is a big element in their consideration. I most certainly do contend that that should be taken into consideration.

The Court: You mean it is your contention—I cannot understand this—that if United Artists got the largest gross of any picture in Philadelphia, from the Viking, they ought to award their pictures to Viking?

Mr. Sawyer: Well, no, that overstates it, Your Honor.

Your Honor stated it correctly the first time.

(6862)

The Court: All right.

Mr. Sawyer: (Continuing) That it is a factor, Your Honor. It is a factor.

The Court: All right. I will overrule the objection.

By Mr. Sawyer:

Q. Now, you had already earned over there in three weeks, $26,000 the first week, $18,000 the second week,

and $12,000 the third week—and I am rounding them off—there are hundreds of dollars in addition to that in each case—had you not, at the time you had this contract signed for SUMMERTIME with the Randolph?

A. If you say so, Mr. Sawyer.

Q. This is subject to check.

A. But that had nothing to do with the determination about where the picture should play.

Q. All right—

A. —because—

Mr. Ward: Let him finish.

The Court: Let him finish.

A. (Continuing) Because, if I may finish, the Viking could not play this picture until about September 20, in mid-September.

This picture, by the very nature of its title,

(6863)

SUMMERTIME, we wanted it to play in the summer. It was a picture about vacations, and it was very important that the picture play in the summertime, and, frankly, we thought the picture was going to do a lot of business.

We had had engagements in New York. We were very hopeful on it, and we wanted a good theatre, and a theatre well-located, and a theatre with a lot of seats.

But the Viking Theatre was already obligated with a picture and it could not play it in the summertime.

By Mr. Sawyer:

Q. And where did it finally play?

A. It played the Randolph Theatre.

Q. Did that have the most seats in Philadelphia?

A. It did not have the most seats in Philadelphia, but it had a substantial number of seats.

Q. You didn't want the theatre with the largest number of seats for SUMMERTIME?

A. I might have.

Q. But it was on the wrong side of the split, wasn't it?

A. They weren't interested in the picture, Mr. Sawyer, the Randolph was interested in the picture, and we negotiated a license with the Randolph Theatre, which we felt was a good theatre.

(6864)

It was on Chestnut Street, in a heavily populated area, with stores, particularly women's stores, where ladies go to shop; specialty shops. I am sure you know many of them. John Wanamaker's, the Blum Store, many fine women's specialty shops. We were looking for that type of people, the women, to come in and see this picture.

Q. Were you ever down there in that section where the Randolph is on a summer weekend, when those stores are closed?

Have you ever been along that block there, Mr. Tunick?

A. I have been along that block in a summer weekend as well as I have been at the Viking Theatre on a summer weekend or anywhere else in the city.

Q. But do you think it is fair to say that that block on a summer Saturday or any time on a summer weekend, where the Randolph is, when we are talking about summertime, will be where they get the expression that on a weekend Philadelphia is absolutely empty, from one end to the other?

A. Mr. Sawyer, if that condition prevailed, it would prevail all over, but we did have the additional advantage of all the shopping days, the heavy matinees that the Randolph produced.

I am sure if you went by the Randolph yesterday

(6865)

you saw thousands of people going by.

Q. What happened yesterday, Mr. Tunick, I think is outside the suit.

Now, actually what happened at the Randolph with SUMMERTIME?

A. The picture was licensed to the Randolph Theatre.

Q. Is that all? Did anything else happen?

A. What do you have in mind, Mr. Sawyer?

Q. Well, you tell me, if you will. The picture was licensed to the Randolph. Then what happened? It played there, did it?

A. Yes, sir, it played the Randolph.

Q. And that is all there is to it, is it?

Mr. Nizer: Objected to.

The Court: Sustained.

Mr. Ward: Objected to.

The Court: Ask him a question.

Mr. Sawyer: Well, Your Honor, the witness seems to be able to have such volubility on some questions. I am wondering if he has any that he can tell us about what happened.

Mr. Ward: Must we have this—

The Court: We are not interested in that at all, Mr. Sawyer. Ask him a question about something.

By Mr. Sawyer:

(6866)

Q. What was the contract? You have it there, Mr. Tunick. What was the contract for the playing time of SUMMERTIME?

A. What was the contract?

Q. Yes.

A. Do you want to know the terms, is that it?

Q. Yes, I do, sir.

A. It was an eight-week contract. The first week was 50 per cent, the second week was 40 to 50 per cent, the third week was 40 to 50 per cent, and the terms for the subsequent weeks were 25 to 50 per cent on a sliding scale which enabled us to earn 50 per cent, and that appears on this contract.

Q. And—

A. And there is no provision for advertising, which was reached mutually.

Q. And, as you testified, this picture with the title SUMMERTIME, it was quite important that it play through these eight weeks of summertime; is that correct?

A. No, Mr. Sawyer, it was important that we get as much of the summertime that was left.

This picture was only made available by this document on August 3rd. So there was possibly four weeks left in the summertime, if you want to say it ends on Labor Day.

Q. Well, summertime actually ends on September 21st. I

(6867)

guess we can agree to that, can't we?

A. I will agree to that, Mr. Sawyer.

Q. Did the picture play the eight-week contractual commitment there that the Randolph undertook?

A. No, it didn't, Mr. Sawyer.

Q. And when I asked you if there is anything more that you could tell us on SUMMERTIME just a moment ago, did you have that in your mind then?

Mr. Ward: That was not the question, whether he could tell us anything more. He said: What happened?

The Court: Yes.

Mr. Ward: Is that all that happened? That was the question.

By Mr. Sawyer:

Q. Well, when I asked you what happened, Mr. Tunick, did you then have in your mind the fact that they didn't play the eight-weeks' commitment?

Mr. Ward: Objected to.

The Court: Sustained. We are not interested in what he has in his mind, Mr. Sawyer.

Mr. Sawyer: I think this is legitimate cross-examination, Your Honor.

The Court: I do not care what he has in his mind when he answers the question. Ask him another question.

(6868)

Mr. Sawyer: I think it is within the cross-examination.

The Court: He could have had a lot of things in his mind.

Mr. Sawyer: When Mr. Nizer was examining Mr. Wren on the stand it seemed to me from my observation, Your Honor, that there was almost no limit to the kind of questions he could put to him, and I ask Your Honor only for the same leeway. These witnesses are adverse. They are called on cross-examination.

The Court: I will give you the same leeway, but to ask him if he has something in his mind is different.

Ask him a question.

By Mr. Sawyer:

Q. Now, Mr. Tunick, that was a breach of contract on the part of the Randolph, wasn't it?

A. Yes, it was, Mr. Sawyer.

Q. Did you ever sue them, United Artists ever sue the Randolph for that breach of contract?

A. Well, first of all, we--

Q. Can you answer whether you did that?

A. We tried to collect our money.

If you want to go back, yes, we entertained

(6869)

the thought of suing them, but we made valiant efforts in order to collect our money, to try to collect our money. But we didn't sue them, no more than we sued the Viking when he owed us for NOT AS A STRANGER and DESERT SANDS. We didn't want to sue anyone.

Q. And didn't you ever collect your money?

A. No, we didn't.

Q. Did you collect your money from the Viking on DESERT SANDS?

A. No, we didn't. We adjusted the picture. DESERT SANDS we adjusted, NOT AS A STRANGER.

Q. And did you adjust the motion picture SUMMERTIME?

A. We altered the contract from 8 weeks to 4 weeks.

Q. Now, the Viking, on NOT AS A STRANGER, didn't pull the picture sooner than its contract commitment, did it?

A. I am sorry, you will have to repeat the question.

Q. On NOT AS A STRANGER the Viking hadn't pulled the picture earlier than its contractual commitment, had it?

A. I presume it didn't want to pull the picture. They made no overtures to pull it.

Q. Well, did they make any overtures to you on this? They just pulled it, didn't they, on SUMMERTIME, the Randolph?

A. Oh, no, he asked me if he could pull it.

Q. And you said no?

A. I strenuously objected that he couldn't pull it.

(6870)

Q. And he did it anyway?

A. It was a unilateral decision that he made.

Q. You then compared it to NOT AS A STRANGER, but the Viking played its full ten-week commitment on NOT AS A STRANGER, did it not?

A. Mr. Sawyer, I didn't compare it to NOT AS A STRANGER, you mentioned NOT AS A STRANGER.

Q. Didn't you just say—

A. With regard to owing us money, yes.

Q. And then you mentioned NOT AS A STRANGER, did you not?

A. That is true.

Q. And the situation isn't comparable, is it, sir?

A. Well, I believe it is comparable.

Q. Did the Viking play its full ten-week commitment on NOT AS A STRANGER?

A. That is correct.

Q. Very well. Then they didn't breach their contract on NOT AS A STRANGER, did they?

Mr. Nizer: Yes.

The Witness: Oh, yes.

By Mr. Sawyer:

Q. Didn't they come around and ask you for an adjustment on the last week of NOT AS A STRANGER? They asked you for it, did they not?

(6871)

A. Yes.

Q. And you granted it, did you not?

A. We granted it after a considerable hassle and length of time.

Q. Isn't that always true when you negotiate an adjustment, you have some discussions, do you not, back and forth?

A. Well, as a matter of fact, Mr. Sawyer, I believe we tried to collect that money for six months, and Mr. Wren flatly refused to pay it, and we adjusted it.

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(6872)

Q. Well, I will start with SUMMERTIME.

In addition to the fact that the motion picture was pulled in breach of contract after four weeks, where the contract called for eight; in addition to that, there was film rental owing, even on those four weeks, which was never paid by Goldman, wasn't there, a small amount?

A. To the best of my knowledge he paid the film rental on the film.

Q. Well, I invite your attention to an answer to an inter-

(6873)

rogatory filed by the plaintiff in which it is stated, and I will not read the whole thing, there might be objection, that there was $110 owing on that that was never paid. I said a small amount. Is that right?

Mr. Nizer: Yes, that is right. I think that is correct, Mr. Sawyer.

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(6875)

Mr. Sawyer: These are claims, Your Honor, which total more than $4600, the total listed here, but I have the individual amounts here, of film rental that was never paid by Goldman, that was obligated to be paid by him under the contract, and United Artists said that they had not abandoned these claims, they had never brought suit for them, and at the time that these interrogatories were filed on 10/16/59, they state that they have not been the subject of suit, but have not been abandoned.

I offer that evidence to show discrimination, and I offer that evidence to show and to prove that the suits brought by the defendant distributors against the Viking are harassing suits, because when the same thing happens with other companies—not the same thing, in fact, totally unjustifiable withholding, not an adjustment, or something on account of a guarantee, but a total withholding of money—there is no suit brought, and there never has been any suit brought. The statute of limitations has run on the claim so of course they cannot do anything about it, they have to let it go.

That is my offer.

The Court: How many pictures?

Mr. Sawyer: Four pictures.

The Court: What are they?

(6876)

Mr. Sawyer: ROMEO AND JULIET to the tune of $2423, SUMMERTIME, $110, THE KENTUCKIAN, $1772.44, and NIGHT OF THE HUNTER, $297.65.

Mr. Adams: Mr. Sawyer, don't you want to tell Judge Lord that the answer to the interrogatory says that the film rental on KENTUCKIAN was paid in full? It does say that.

Mr. Sawyer: Oh, I am sorry.

Subsequently, the film rental for the motion picture KENTUCKIAN was paid in full.

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(6882)

Mr. Sawyer:

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The point is that if I have not been able to show that there were occasions on which both the Goldman

and the Stanley Warner Theatres just simply refused to pay film rental,

(6683)

they just refused. Now, true, later, it may have been handled in a bookeeping fashion, but that is not an adjustment. The ordinary adjustment is as we understand it, you come around and say, Give me a break—they testified to it—the picture didn't go well. We don't want to hurt the fellow so we gave him an adjustment.

The point, however, is that I have not been able to show, the jury does not know and never will, that these people simply refused to pay film rental on occasion.

The Court: Surely, on SUMMERTIME, Goldman.

Mr. Sawyer: Yes, but that doesn't mean a thing, just one picture, $100, when we have some of these others in here for $1000. To be confined to $100, it is bad luck that it has to be that low.

What I say is, shouldn't it cut both ways?

If the picture that we didn't pay film rental on, they say, or we were late, wasn't one on which the defendants made any bid, why should they care? It should cut both way.

Your Honor said: Well, how could you complain about what was done with Goldman if you didn't bid on it? I say, why doesn't it cut the other way?

If they said we were slow in paying film rental on such-and-such a picture, and if it is not one they bid on, then it ought to cut that way.

(6884)

The Court: You may have a point so far as Goldman and Stanley Warner are concerned, but what about the distributors?

So far as Stanley Warner and Goldman are concerned I think that is right, that they ought to be confined to the 87 so far as any film rental.

Mr. Sawyer: To those out of the 87, you mean, on which they bid.

The Court: What?

Mr. Sawyer: To those out of the 87 on which they bid.

Mr. Rome: No.

The Court: I agree with that as far as Goldman is concerned.

Why shouldn't you be confined to the 87 too.

Mr. Rome: Because of the fact that it is the plaintiff who brings me into court and charges me with a conspiracy, and I certainly should be entitled to interrogate witnesses with regard to what happened in so far as the plaintiff is concerned. I am here against my will.

Mr. Sawyer: This is a novel rule.

Mr. Rome: Because he expresses an interest in certain pictures this is all that he can possibly complain about, but since I am a defendant I have a right to interrogate

(6885)

about any issues in the suit within the confines of the 87 ruling which Your Honor has laid down. This has been the way it has gone all the way along right up to this day of trial, sir.

Mr. Ward: That is right.

This is a rehashing of the same point, sir.

Mr. Sawyer: Your Honor—

Mr. Ward: Will you let me say a word to the Court.

This is an adroit maneuver to reargue the same thing that Your Honor carefully laid down in nine different points on June 13. You squarely ruled that any subject of adjustments would be confined to the 87 pictures.

Now, this subject of what the experience was of these several distributors with the Viking Theatre in so far as film rental is concerned, Your Honor observed just yesterday, is a vital consideration in connection with the evaluation of bids, it is one of the vital factors that must be taken into account.

Now, as I understand Mr. Sawyer, he says that because he cannot bring out testimony about pictures which he never sought, we ought not to be permitted to develop the business relationship between these distributors and the Viking Theatre with respect to business conduct, which is a

(6886)

critical and essential element to be taken into account in evaluating bids.

The two things are at opposite poles, and, I repeat, this is simply an effort being made to make complaints about matters that couldn't possibly be discriminatory, couldn't possibly have hurt, or affected, or injured the Viking in the remotest sense, and I think we should adhere to the ruling that Your Honor has so firmly established, and this is the thirty-eighth day.

Mr. Sawyer: I am not asking what Your Honor is going to do about the Viking now. That ruling is past and over with.

The Court: Well, the question is not before me at the moment. I will think about it.

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(6889)

Q. Now, Mr. Tunick, the Viking submitted an offer to you on

(6890)

that picture, did they, AMBASSADOR'S DAUGHTER?

A. As best I can remember, they submitted an offer upon my solicitation of them—to them. They weren't—I don't believe they bid, Mr. Sawyer.

Q. Oh, you say you don't think they did?

A. I don't remember.

Q. Well—

Mr. Ward: "I don't think they bid."

By Mr. Sawyer:

Q. Oh, you don't think they bid; I thought you said "did."

A. I don't think they did.

Q. Now, was the offer in writing?

A. No. I think it was an oral offer.

Q. And did you consider the—strike that.

Did the picture play at the Randolph Theatre?

A. The offer—the picture played at the Randolph Theatre, to answer your question, played at the Randolph Theatre.

Q. And can you tell me why you considered the offer of the Randolph superior to that of the Viking?

A. I would like to see the offer from the Randolph and the offer from the Viking.

Q. Well, I thought you said the offer from the Viking you thought was oral.

A. Well, do you have a record of their offer?

(6891)

Q. Well, I don't; no. We have a record of it: yes. Well, maybe I can save some time, Mr. Tunick. You were asked on deposition about it as follows:

"Q. Can you tell me by referring to your records why you considered the Randolph bid on AMBASSADOR'S DAUGHTER better than the Viking bid?"

This is page 82.

Then you answered:

"Neither the Randolph nor the Viking bid on the picture.

"Q. I mean the offers. I am sorry. I amend that to say offers instead of bid."

And then you say:

"According to the records I have in front of me"—you had records then at that time, apparently—"the Randolph offered three weeks, but the Viking offer was only a guarantee of one week.

"Q. Is that the criterion you used?

"A. That could have been part of it. I don't have any record of making any recommendation. I don't know what the New York office used."

So does that.

Mr. Nizer: If you want these, Mr. Sawyer, I have them here.

(6892)

Mr. Sawyer: All right. I examined him about them. All right.

Mr. Nizer: Here it is.

By Mr. Sawyer:

Q. Well, do we need those too, or does that make it clear to you, Mr. Tunick, that—

A. I would like to look at them.

Mr. Ward: I am handing Mr. Sawyer the copy of the Randolph bid and the copy of the letter from Tunick to Wren dated July 12, 1956.

Mr. Nizer: The Randolph contract, not the bid.

Mr. Sawyer: All right, July 12, and here is the —well, there is no letter reflecting the offer, I take it, of the Randolph.

Mr. Nizer: It was an oral.

Mr. Sawyer: All right, yes, both of them.

By Mr. Sawyer:

Q. Now, that is the license. That letter there to Mr. Wren recites what his offer was, does it, sir?

A. That is correct.

Q. And what was it, the typed-in portion? The rest is a form. What was it?

A. Fifty per cent first week indefinite run, 25 per cent balance. One week—

(6893)

Q. Twenty-five to 50 per cent balance?

A. Twenty-five to 50 per cent balance; one week guarantee.

Q. All right; and under the license to the Randolph—do you want to look at that, too?

A. Yes.

Q. And now having looked at those two, would you confirm your statement made in your deposition that the —that an important factor was this difference between the one-week commitment and a three-week commitment; Randolph offered three weeks; the Viking only offered one?

Mr. Nizer: No. I object to that, because the answer is that it could have been part of it. I think you ought to ask him—

Mr. Sawyer: Yes; all right.

Mr. Nizer: —about those considerations.

By Mr. Nizer:

Q. Well, was that a consideration? I will just ask you now. Was that a consideration in awarding this picture to the Randolph that it bid three weeks minimum and the Viking only gave you one week minimum?

A. According to this document here, the Randolph license is for two weeks.

Q. Oh, I am sorry. Two weeks. Was that part of the consideration in deciding to whom to award this picture?

(6893a)

A. Most certainly. That was part of it, plus the fact that again we wanted the Randolph Theatre because of its location and size.

(6894)

Q. And what was the previous picture that had played the Randolph?

A. I don't recall.

Q. Will you accept my statement that it was SUMMERTIME?

A. Yes. I will accept that.

Q. And the playing time commitment on that didn't turn out to be any good, did it?

A. I have already testified that the picture was reduced in playing time.

Q. Well, it was cut in half, wasn't it?

A. Yes.

Q. Now, in this motion picture, SUMMERTIME, which we have had a lot of testimony about, the important time as to when the picture was to play, did you find that the grosses that were achieved at the Randolph were commensurate with this added and additional size that you were looking for?

A. Mr. Sawyer, as it turned out, SUMMERTIME was not a successful picture. Nationally it was far below our expectations. We had hoped seriously that it would

be a $4 million picture, and as I think it only came out to be about a $1 million picture, maybe a little more. It was a—

Q. One and a half, wasn't it?

A. It was a bitter disappointment.

Q. One and a half, actually?

(6895)

A. One and a half. It was a bitter disappointment.

Q. But those seats in the Randolph that you were counting on, they turned out to be mostly empty during this performance, did they not, sir?

A. As it turned out; however, I am sure we benefited by playing the Randolph, because we did get the benefit of the matinee business and as I explained before about the area and why we would get that business.

Q. And this is why you were pulling in the largest film rentals that United Artists had ever earned up at the Viking Theatre—

Mr. Ward: Objected to.

By Mr. Sawyer:

Q. —at this time; is that right?

Mr. Ward: Objected to as argumentative, if Your Honor pleases.

Mr. Sawyer: Cross-examination, Your Honor.

Mr. Ward: It is argumentative, and he can't argue with the witness, and I object to it.

The Court: Overruled.

By Mr. Sawyer:

Q. Same time, wasn't it? It was the same time, was it not?

A. Mr.—yes, Mr. Sawyer, the picture NOT AS A STRANGER

(6896)

was a better than a $6 million grosser—

Q. Yes. I agree with you.

A. —and turned out to be a success. In fact, the contrary here. This was far beyond our expectations; where SUMMERTIME was the reverse. It just didn't work out.

Q. And your expectations on SUMMERTIME were that it would be better than $4 million; that is what you just said, wasn't it?

A. We had hoped that it would be a $4 million picture.

Q. And your expectations on NOT AS A STRANGER were, since it was less than what you did, would have been what—also about $4 million?

A. We were anticipating a $4 million gross.

Q. So at the time you made this decision, the anticipated gross on both the pictures in the mind of United Artists was exactly the same, was it not?

Mr. Ward: Objected to, if Your Honor pleases, and I am going to renew my objection to this line of interrogation of this witness on this ground for this reason: The testimony is that the Viking Theatre at the time that this matter was committed under contract played NOT AS A STRANGER under an obligation, if my memory serves me, either ten weeks or twelve weeks.

Mr. Tunick from the stand this morning was

(6897)

said they were so committed.

Now my friend in his line of examination is in effect trying to create a situation where he is attempting to show that United Artists made some wrong decision in not giving the Viking SUMMERTIME when the Viking was already committed to play NOT AS A STRANGER and in effect saying "Why didn't

United Artists pull out of the Viking and put SUMMERTIME in there?" completely forgetting that during this entire morning that if they did so they would expose themselves to liability to the producer for whom they were acting as agents.

I object to it.

The Court: Overruled.

By Mr. Sawyer:

Q. Now, you testified that the desired playing time of United Artists for the picture SUMMERTIME was to be eight weeks?

A. Yes, sir.

Q. All right; and that it was to play those eight weeks in so far as possible during the summertime?

A. That is correct.

Q. And we also agreed that it in fact only played four weeks?

A. That is correct.

(6898)

Q. Now, wouldn't it be true that on that basis, that only playing four weeks, that it could have played the last four weeks of NOT AS A STRANGER instead of NOT AS A STRANGER, and that you then would have had part of the same playing time that you would have enjoyed had the Randolph lived up to its contract; you would have eliminated only the last four grossing weeks of NOT AS A STRANGER.

Mr. Ward: Objected to as argumentative, speculative and conjectural.

The Court: Overruled.

A. Well AS A STRANGER had a ten-week commitment.

By Mr. Sawyer:

Q. And that commitment expired on the 8th of September; is that right?

A. If you say so. I don't recall. It had a ten-week commitment.

Q. Yes; and the last week, Mr. Tunick—

Mr. Nizer: He didn't finish.

Mr. Ward: He didn't finish.

By Mr. Sawyer:

Q. Oh, didn't you finish? I thought you just were stating that. All right. Go ahead.

A It had a ten-week commitment.

Q. Yes, with your company.

(6899)

A. With my company and with the producer of the picture.

Q. Yes; all right; now, by the eighth week of NOT AS A STRANGER, after the seventh week, the gross had fallen below 10,000, had it not?

A. Yes, but the determination on this picture was made much before that.

Q. Well, did you anticipate that NOT AS A STRANGER, which you thought only be a $4 million picture and turned out to be a $6 million picture nationally, would be holding up better than $10,000 after seven weeks of playing time?

A. It is hard to say what you can anticipate. All I know is at the time I was talking to Jay Wren I believe he was doing about $25,000 a week, which was big business.

Q. Oh, he certainly was in the first weeks, but didn't this picture exceed your expectations?

A. Nationally, it did.

Q. Well, didn't it exceed your expectations at the Viking?

A. It was an excellent gross.

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(6907)

By Mr. Sawyer:

Q. How many United Artists pictures, Mr. Tunick, were released during the period of this suit? Are you familiar with the period?

A. Yes.

(6908)

Q. The dates of that, I mean. You are familiar with those dates?

A. Yes, I am.

Q. How many or approximately how many United Artists pictures were released during that period?

A. I believe it is 55.

Q. You didn't mean literally then the statement that you made this morning, did you, that the Viking was playing all or most of your pictures?

A. Well, what I meant, Mr. Sawyer, was he played most of the pictures he was interested, most of the pictures he was interested in he played.

Q. But he didn't play most of them, did he? You didn't mean that literally, did you, that he played most of the pictures, United Artists pictures?

A. Naturally he couldn't play all 55.

Q. He couldn't possibly, could he.

Now, do you recall in the contract of NOT AS A STRANGER that it was required that the Viking itemize its house nut? Do you remember that, sir? Do you want me to show it to you?

A. Yes, please.

Q. I show you a copy of the license agreement of United Artists for NOT AS A STRANGER, and does that refresh your

(6909)

recollection that the Viking there as part of its license agreement was required to itemize its house nut?

A. Yes.

Q. Is there any other instance in which this was required of any of the defendant exhibitors during the period of suit?

A. I don't believe it was an instance of any defendant exhibitors, bu tthis was a requirement by the producer of this picture.

Q. I understand that, but are there any cases in any other United Artists picture licensed out of this 55 to anyone else first-run Philadelphia where it was a requirement that the exhibitor itemize his house nut?

A. To no other exhibitor, including the Viking. There wasn't another picture like this.

Q. Very well. This is unique then during the suit, isn't this requirement? It is a unique requirement, isn't it?

Mr. Nizer: That is objected to, Your Honor.

The Court: Sustained.

By Mr. Sawyer:

Q. And on that motion picture was there another bid on NOT AS A STRANGER from anyone else in Philadelphia?

A. Yes, there was.

Q. Who was that? What theater was that?

A. The Stanley bid for the picture and I believe the Arcadia

(6910)

bid for the picture.

Q. And did they Stanley itemize its house expense in its bid?

Mr. Wolf: Objected to, sir.

Mr. Ward: Objected to.

Mr. Wolf: —unless the bid is shown to have called for an itemization of house expense which would be true only if the bid depended on the amount over house expense that the distributor would receive.

By Mr. Sawyer:

Q. What is the Stanley bid on a house nut bid?

Mr. Ward: I would like to add to the objection stated by Mr. Wolf the additional objection that it is quite immaterial, especially through this witness, what some other exhibitor did with respect to this particular contract NOT AS A STRANGER, which I submit speaks for itself. So regardless of the reaction of terms or another exhibitor to an invitation to bid, the contract between Viking and United Artists, which was acting for the producer, speaks for itself and stands on its own footing, and, therefore, the comparisons would be the conduct of another exhibitor and I submit would have no place in the case.

Mr. Sawyer: Your Honor, this is in the 87. It is one of the pictures in the case.

(6911)

The Court: Overruled.

Mr. Ward: They played this picture, if Your Honor pleases.

The Court: Well, they got the picture and they played it, but, as I understand, it is the plaintiff's contention that they were required to do something that another exhibitor was not required to do.

The question is whether—they certainly weren't forced to do it but I will permit the evidence.

Mr. Wolf: How could another exhibitor be forced to do it if he didn't get the picture?

The Court: Overruled.

By Mr. Sawyer:

Q. I showed you the bid of the Stanley Theatre for the motion picture NOT AS A STRANGER. Now, there is no itemization there, is there, of the house expense of the Stanley Theatre?

Mr. Ward: That is objected to, if Your Honor pleases. Your Honor's ruling was based upon what the requirement was, not what the particular exhibitor did. I therefore object to it on that ground.

Mr. Sawyer: Well, I will ask him that way.

The Court: Overruled.

By Mr. Sawyer:

(6912)

Q. Did you require the Stanley Theatre to itemize its house expense in submitting that bid?

Mr. Ward: That is objected to because these are documents, if Your Honor pleases, that we are concerned with, not what Mr. Gene Tunick, the witness, did. These are all documents. Here is the document from the Stanley, rejected bid, a writing. It speaks for itself. What the Stanley was required to do by way of complying with an invitation to bid is measured by the writing, not by some recollection by this witness as to what may have been. We are dealing with contractual terms, invitations to bid, and those ought to control if there is going to be any real meaning or significance to this.

The Court: Well, the witness can be asked to look at them before he answers.

Overruled.

The Witness: Would you repeat the question, please.

By Mr. Sawyer:

Q. The question was whether or not you required the Stanley Theatre to submit a bid which itemized their house expense on the picture NOT AS A STRANGER.

A. Yes, we did.

Q. And did they do it?

(6913)

A. No, they didn't, and they lost the picture.

Q. Very well.

By Mr. Wolf:

Q. Did you say they lost the picture?

A. Lost the picture.

By Mr. Sawyer:

Q. And was that the reason?

A. I believe there were many reasons.

Mr. Sawyer: No further questions.

CROSS-EXAMINATION

By Mr. Nizer:

Q. In sending bids to the home office for action by the Bidding Department, do you also require the approval of the producer of the picture?

A. Yes, sir.

Q. Does United Artists produce motion pictures or does it only distribute them?

A. We distribute them for independent motion picture producers.

Q. So that the United Artists, unlike Loew's or any of the other companies, hasn't got its own production; is that correct?

A. That is correct, Mr. Nizer.

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(6914)

Q. Who had the final approval of any bid or offer in your company? Was it your home office or was it someone else—the final?

A. It was the producer's representative.

Q. Who is not associated, or is he associated with United Artists?

A. Oh, no. He represented the producer.

Q. Now, when you sent the various bids that came in, was it customary for you or was it not to on occasions simply tell your secretary to send them in with whatever recommendation you had?

(6915)

A. That was the general practice, Mr. Nizer.

Q. This letter, the one that was shown to the jury—has it been turned back?

A. I think I have it.

Mr. Nizer: Have you got it back yet? This is all right, I have it here, sir.

By Mr. Nizer:

Q. Now, this document which was shown to the jury, P-76, to the best of your recollection, will you explain how that came about that there is this writing, not in your handwriting, on that document?

A. It is very difficult to recollect the exact thing that happened, but I do believe that this was just a case where I told my secretary that recommend it be rejected and renegotiated, and she simply typed the wrong thing on there, and I was probably out of my office when it was read back to me and somebody corrected it.

Q. In any event, did you forward all the bids or only the Viking?

A. All the bids.

Q. Does this recommendation go to all bids or only to the Viking?

A. Yes, all bids that were rejected.

Q. Counsel showed you the answer that came from your home

(6916)

office. Have you got it there in front of you? It is a black photostat, I believe—Mr. Hughes.

Here is a copy of it. This will do to save time, sir, this copy of it.

By Mr. Nizer:

Q. Will you read—well, I will do it, it is so brief. This is from Mr. Hughes. I think you have identified him as the head of the Contract Department.

A. That's correct.

Q. "We are returning attached hereto rejected your copies of the bid deals which have been submitted for SUMMERTIME by the Viking, Arcadia and World Theatres Philadelphia first-run."

I stop there and ask you whether the rejections were merely of the Viking or of all bids that were handed in?

A. Well, they were for all bids, Mr. Nizer.

Q. So that no bid was accepted in this case?

A. That is correct.

Q. At any time. And the next sentence: "Please negotiate locally for the sale of the picture in this situation. Kindest regards."

Now, did you pursuant to that instruction from the home office Contract Department then proceed to a

(6917)

negotiation effort on this picture SUMMERTIME?

A. I most certainly did, Mr. Nizer.

Q. And whom did you call, briefly?

Mr. Sawyer: Objected to as repetitious. The witness testified to that.

The Court: Overruled. Certainly the attorney for the defendant can ask him concerning circumstances. Overruled.

By Mr. Nizer:

Q. Whom did you call?

A. I called the Arcadia Theatre.

Q. Who did you speak to there, do you recall?

A. I believe it was Mert Shapiro.

Q. And who else?

A. I called Jay Wren at the Viking Theatre.

Q. And did you call the World Theatre?

A. I spoke to the World Theatre, yes.

Q. And did you call anybody else?

A. Are you referring to the negotiations?

Q. Negotiations.

A. Yes, I spoke to George Beattie at the Randolph Theatre.

Q. Of the Randolph—the Goldman Theatres. Now, counsel asked you—first, what was your conversation, in substance, and briefly, with Mr. Jay Wren?

(6918)

A. Well, I told him that the bids were rejected, and he was given a written notification that they were, and asked him if he was still interested in the picture and he said, "My offer stands."

Q. Did you at the time on a piece of paper in your office, with these doodles on them, did you make memoranda of who you called and what the conversations were and the conclusion?

A. Yes, I did, Mr. Nizer.

Q. For example, it says here, "Arcadia Same Terms Only Ten Weeks." How many weeks had the Arcadia given you in the bid?

A. Their bid was for eight weeks and in calling the Arcadia to find out if they wanted to make any improve-

ment, they did improve it by extending the playing time to ten weeks.

Q. So does that refresh your recollection that you talked to somebody at the Arcadia and they improved the terms from eight to ten weeks and you wrote it down at that time?

A. That is correct.

Q. Is there a line for the Viking?

A. Yes, there is.

Q. And what did you write on that at that time? When you had the conversation did you write that down at the time, when you talked to Mr. Wren?

A. Yes.

(6919)

Q. What does that say?

A. "The same offer." The same offer.

Q. What you testified to. Now, what have you got for the Randolph?

A. Randolph gave me an offer of eight weeks, 50 per cent, 40 to 50 per cent, 40 to 50 per cent, and five weeks at 25 to 50 per cent and advertising not part of the deal.

Q. And you wrote that down at the time you were talking to them on the phone?

A. That is correct.

Q. Now, in the left-hand corner—I am going to show this to the jury in a minute, but first I want to identify it—in the left-hand corner are the terms you jotted down at the time of the conversation?

A. That is correct.

Q. Now, the right-hand side it says something. Will you tell us what that says? Is it all in your handwriting?

A. Yes.

Q. And what does it say on the right-hand side?

A. In the lower right-hand corner, Mr. Nizer?

Q. Yes, sir.

A. It says, "Get figure $15,000 7th week will pay 9th week," which is a control figure which I was trying to get.

(6920)

Q. What does control figure mean? Briefly, very briefly, explain it.

A. It means if a given theatre grosses so much on let's say in this case the 7th week, that we would be insured that the picture then played a 9th week.

Q. Did you get that finally from him? You said "get it." Did you get it?

A. No, I didn't.

Q. So you made a term finally on the terms that are in the left-hand corner, right?

A. That's correct.

Q. And was this put into your file at the time of these incidents?

A. Yes.

Q. This document?

A. Yes.

Q. Of which this is a photostat. And it has been in your file during all the discovery proceedings and examinations by the other side, has it not?

A. Yes.

Mr. Nizer: Now, may I show this, the same way, to the jury?

Mr. Sawyer: I object to it, Your Honor,

(6921)

and I object to it because the paper was not produced at the time of discovery.

Mr. Nizer: Perhaps he hasn't a right to say that. It was--

The Court: Overruled.

By Mr. Nizer:

Q. Is there any doubt, therefore, in your mind that you did negotiate with Mr. Wren for SUMMERTIME after the bid was rejected? Any doubt at all?

A. None whatsoever.

• • •

(6922)

Q. Now, counsel asked you whether this is a form that is sent out and you said it was. I ask you whether in every instance in which bids are rejected you sent to all of the prior bidders an invitation to negotiate?

A. That is absolutely correct.

Q. Have you always done that with the Viking?

A. Always.

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(6923)

Q. I show you the offers on both, that is the recorded offer of the Viking and of the Randolph, and, as briefly as you can—we don't need too much detail—will you tell why in your judgment you feel one offer is better than the other, if you do?

(6924)

A. Well, there are many reasons. First of all, we felt the availability was better. Secondly, we felt the theatre was better. Third, we felt that the Viking was limiting us to 21 days with a possible hold-over to five weeks, in addition to which the Viking received the first $4970.19 at the boxoffice before we participated while on the Randolph bid we received 50 per cent of the full amount taken in. Now, there was a guarantee on the Viking but it was $12,500, which is a very small guarantee, and taking into consideration the amount of advertising that we would have to spend it is very possible we might play this for our health or come out with very little money, whereas under the

eight-week commitment of the Randolph we knew that in the first week we were going to get 50 per cent, in the second week we were going to get 40 to 50—in other words, we were going to have an opportunity to get 50 per cent of all the money that came in the boxoffice the second week and also the third week and the five subsequent weeks we still had an opportunity to get 50 per cent of the gross receipts, net receipts.

(6925)

Q. In other words, it was eight weeks against three, with a possible two more?

A. That is correct?

Q. Eight for the Randolph. Now, you said advertising, you would be playing it for your health. What advertising, in what offer? Whose advertising clause were you referring to?

A. Oh, the Viking advertising clause stipulated that we pay for all advertising, including newspaper ads, engraving, radio, TV, spot announcements, four painted bulletin boards, and daters as well as fourteen 24-sheet billboards and dates—

Q. All right.

A. —theater lobby, et cetera, et cetra, et cetra.

Q. Is that the customary advertising clause that you saw in the industry?

A. It was not customary in industry, in the industry, but it was customary for the Viking.

Q. Now, I now ask you about the examination of what happened at the Randolph for the four weeks. Do you recall they pulled the picture unilaterally, as you said? Did you—will you tell us briefly the conversation with you and, who was it did you talk to at the Randolph when that picture was pulled at the Randolph?

A. George Beattie called me and told me that he would like to take the picture out. I objected to his taking the

(6926)

picture out and I pointed out that we had an eight-week commitment and we excepted the picture to play eight weeks.

He said that the picture wasn't doing well; it was far below his expectations—as a matter of fact, it was far below our expectations—but it was doing poor and he would lose money and we wouldn't get much money, and he wanted to take the picture out, and while I was sympathetic with Mr. Beattie, I insisted that the picture stay in.

Q. Did you cooperate with him in just granting his request or was there a considerable dispute about that?

A. Oh, well, we had—

Mr. Sawyer: Objected to, if Your Honor please.

A. —quite an argument about it.

Mr. Nizer: Yes; I guess it is.

By Mr. Nizer:

Q. Of course that is a letter which was sent to Mr. Beattie by you with respect to that matter.

A. Yes.

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(6927)

Mr. Nizer: "Dear"—This is from United Artists, Gene Tunick to Mr. Beattie of Goldman:

"Dear George"—this is August 25, 1955—"Dear George"—that is Beattie of Goldman.

"In our telephone conversation of this morning you advised me you were pulling SUMMERTIME at the Randolph Theatre at the conclusion of the fourth week. This is in violation of your contract which calls for a minimum of eight weeks playing time. This is a breach of contract on your part and is being done without our approval."

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(6929)

Q. Ultimately did you bring suit against Goldman for pulling out this picture at the end of the fourth week?

A. No, Mr. Nizer, we didn't bring suit; however, we entertained the thought and gave it very serious consideration for quite a long time, but after weighing all the facts we didn't want to sue Goldman, as we didn't want to sue Mr. Wren at the Viking when he owed us money for DESERT SANDS and NOT AS A STRANGER.

Q. Did you ever bring suit during the period of this suit against the Viking Theatre when they owed this money?

(6930)

A. No. We didn't.

Q. Now, in any event, I ask you is this kind of business dispute that arises or was there some special cooperation between you and Goldman?

A. This was no special cooperation.

Q. Now, sir, on NOT AS A STRANGER, how many bids were there for NOT AS A STRANGER?

A. I believe—

Q. Do you remember?

A. The Viking, the Stanley, and the Arcadia.

Q. Now, the Stanley is the Stanley Warner?

A. Stanley Warner.

Q. And was the Stanley Warner bid rejected?

A. Yes. It was rejected.

Q. And was the other bid, the Arcadia did you say, was that rejected?

A. That was rejected also.

Q. And the picture was awarded by United Artists to the Viking as against the Stanley here?

A. The Viking got the picture.

Q. Now, will you tell us—counsel asked you about an adjustment on the eleventh or twelfth week. In your

own way, so that I do not need to, will you tell us what happened at the end of that engagement. Tell us in your own way what

(6931)

occurred with respect to that engagement at the Viking Theatre towards the end of that engagement.

A. Jay Wren and I had entered into a deal for the twelfth week. Subsequently, after the play-off—

Q. Excuse me. I don't think that is clear. You had a deal. How is it that you entered into one for the twelfth week?

A. I am sorry, Mr. Nizer. The picture was awarded on bid and we served a termination notice, I believe, and he wanted to play—

Q. Was that pursuant to your contract, the United Artists had the right to terminate? Is that what you are telling us?

A. Oh, yes.

Q. And did you serve such a notice?

A. Yes.

Q. And now what happened then?

A. It was Jay Wren's request that he play the picture for a twelfth week, and we entered into a deal for the twelfth week.

Q. At different terms than the original contract?

A. Yes.

Q. And thereafter did he play it for the twelfth week?

A. He did play it.

Q. And under the—what was the term? What was the different term? How about the percentage? Was it under the—for the twelfth week?

(6932)

A. The terms for the twelfth week were 25 per cent.

Q. Now, how much was it—

A. Not up, not down—just 25 per cent straight.

Q. How much was the amount of money of film rental due to United Artists for that twelfth week—twelfth week?

A. I believe it was around a thousand dollars.

Q. Now, tell us in your own way what happened. Did he pay it?

A. He didn't pay it and he came to see and asked that I forget about the twelfth week and not charge any film rental, stating that he had lost money on the twelfth week; however, I pointed out that he had made a lot of money, this had been a very successful engagement for him, and that he made a lot of money and that he was'nt entitled to any adjustment. He, however, pursued it persistently, refused to pay. We—

Q. Did he pay the rest of the bill or just the thousand dollars was held up?

A. I don't recall what was outstanding at that time, Mr. Nizer, but I—

Q. Well—

A. —I know this thousand dollars was in dispute.

Q. Yes; and was there a—to be brief about it, did you continue to ask for the money?

A. Continued to ask for the money—I don't know—six, seven months—

Q. Yes.

(6933)

A. —dunned him for it, asked him for it, sent him statements.

Q. What finally happened?

A. We finally adjusted the picture.

Q. What did you do—give him the thousand dollars finally?

A. We gave him a thousand dollars.

Q. Now, the very next picture—was this the first picture you ever played at the United—at the Viking Theatre of United Artists?

A. It was the first picture; yes, sir.

Q. This was this big success, NOT AS A STRANGER; now, what was the very next picture that came along?

A. DESERT SANDS.

Q. And who made offers for that?

A. Viking and Stanton.

Q. Stanton of the Stanley Warner—

A. Yes, sir.

Q. —Theatres?

A. Yes, sir.

Q. And who did United Artists give the next picture to, that picture, DESERT SANDS?

A. That picture was awarded to the Viking.

Q. And what happened on that picture in so far as the money is concerned?

(6934)

A. Mr. Wren withheld payment for the picture in its entirety and in the whole amount and insisted upon an adjustment. I claimed that is was—I—I told him that it was awarded on a bid and that I didn't care to adjust the picture.

He persisted, and again we had a long hassle; it took quite a bit of time, and I think, as I recall, he finally went to New York and saw one of my superiors who would—who then contacted the producer's representative, and the producer's representative offered to give Mr. Wren an adjustment.

However, Mr. Wren refused the adjustment. He wanted an additional adjustment. He wanted a greater adjustment, and he still refused to pay, and finally, after a long period of time elapsed, we didn't want to sue Mr. Wren; we granted the adjustment.

Q. And during this period of—you say a long period of time—was he withholding only the amount of the adjustment or the entire bill?

A. He hadn't paid anything.

Q. Now, in connection with DESERT SANDS I would like to ask you this: When you gave him the picture as against the Stanley Warner and other offers, was there any change made of the availability date at the request of Mr. Wren or of the Viking?

A. Mr. Nizer, I—I recall that he wanted the picture moved up substantially. I—it may be as much as a month.

Q. That is right. I will give you the dates. See if that

(6935)

refreshes your recollection.

Mr. Nizer: I am sure you won't mind that.

By Mr. Nizer:

Q. October 19, 1955; September 21, 1955. He changed it from October 19 to September 21. He moved it forward a month. Did you grant that request to him?

A. Yes.

Q. So that a change of availability occurs in these matters and you have given it to the Viking; right?

A. That is correct.

Q. Now, was there any other picture in which he wanted to change the availability?

A. Well, the very next picture which was awarded to him on bid.

Q. What was that?

A. THE BIG KNIFE.

Q. What was the change there?

A. There he wanted to go back two weeks later than availability, and again it was satisfactory to us.

Q. I will supply the dates, if you find they are correct. November 9, '55, he changed to November 23. He moved it this time forward two weeks. Did you grant that to him?

A. I believe, Mr. Nizer, he moved it back two weeks.

Q. Moved it back. All right. Did you—well, call it

(6936)

forward. November 23. It doesn't matter. A two weeks change?

A. Yes.

Q. To a later date. Did you grant that to him?

A. Yes. We did.

Q. Now, sir, when United Artists puts a picture out for competitive bidding in downtown Philadelphia, were all theaters, first-run theaters, including the Viking, given the opportunity to submit bids in every instance?

A. In every instance, Mr. Nizer.

Q. Whether a picture was on the split of Stanley Warner and Goldman or not, in every instance everyone was invited; is that correct?

A. There were no exceptions—everyone got bids.

Q. And was that invitation during the entire period of this lawsuit in writing to the Viking as well as to others? Did they get letters in each instance?

A. They were sent—they were sent our standard bid form.

Q. Now, whenever United Artists during the entire period of this litigation rejected bids that had been sent in, did or did not the United Artists then negotiate with the Viking Theatre as well as any other theater?

A. Most certainly, Mr. Nizer, and, as I said before, he got most of the pictures he was interested in.

Q. I will come to the statistics on that; and, irrespective,

(6937)

you negotiated with the Viking in every instance, irrespective of whether that picture was on the split of Stanley Warner-Goldman or not?

A. That didn't make any difference. We negotiated with everyone, including the Viking.

Q. Now, without going through the detailed history, I mentioned the picture ATTACK. Was that picture put out for bidding?

A. Yes. It was.

Q. Were the bids rejected?

A. Yes. They were.

Q. Was the Viking notified in writing of the rejection?

A. If they put in a bid, they were notified—

Q. Yes.

A. —of the rejection.

Q. I have it here. I have it here. I won't take time. I will just advise you; and counsel has it.

Now, after the rejection, did you negotiate with the Viking?

A. I negotiated and the picture was licensed to the Viking Theatre.

Q. Did the Goldman negotiate for the picture ATTACK?

A. Yes.

Q. Who won the picture? Who got it?

A. The Viking Theatre.

(6938)

Q. BANDIDO, a United Artists picture with Robert Mitchum and Ursala Thiess. Is that a Technicolor—

A. Yes.

Q. —CinemaScope picture?

A. Yes, Technicolor and CinemaScope.

Q. Put out for bidding?

A. Yes. It was.

Q. Viking got the usual written notification?

A. Yes; they did; but they didn't bid.

Q. All right; after the rejection of the bids that did come in, what did you do?

A. We negotiated with all theaters and licensed the picture to the Viking Theatre.

Q. Did the Goldman also—was the Goldman invited to negotiate?

A. Yes. They—they made an offer on the picture.

Q. And they made an offer and who got the picture?

A. Viking Theatre.

Q. Even though that picture was on the split?

A. That is correct.

Q. Now, are there any other United Artists pictures which were put out for bid and then negotiated to the Viking even though the Viking had not even put in a bid, in the first place?

A. Yes. I am sure there are.

(6939)

Q. May I mention one—COMANCHO?

A. COMANCHE.

Q. COMANCHE? All right: With Dana Andrews, Linda Christian. Did the Viking in that case—did you negotiate with them?

A. Yes, negotiated with Jay Wren. We licensed the picture to the Viking Theatre.

Q. And he got it?

A. Yes, sir. He did.

Q. Even though he didn't put in a bid?

A. He got it and he played it.

Q. REBEL IN TOWN. Is that true there, too?

A. Yes.

Q. JUST BEFORE DYING. Did you negotiate with him?

A. Yes. We did.

Q. If you remember, who got the picture?

A. The Viking Theatre.

Q. Viking again. HIGH NOON; MOON IS BLUE—those are reissues?

A. Yes.

Q. Who got those?

A. They were licensed to the Viking Theatre.

Q. RUN FOR THE SUN.

A. Also licensed to the Viking Theatre.

Q. Even though you had offers from others?

A. That is true.

(6940)

Q. Either Goldman or Stanley Warner or Arcadia or any of the others. Now, how many of United Artists pictures did the Viking negotiate or bid for during the entire period of the lawsuit?

A. Seventeen.

Q. How many of the seventeen did the Viking get from United Artists?

A. Eleven.

Q. How many of those eleven were obtained by negotiation rather than by bidding?

A. Eight.

Q. How many were obtained by bidding?

A. Three.

Q. At any time in the course of your performance of your duties did you have any agreement or understanding of any kind with either any other motion picture distributor or any exhibitor with respect to how you would decide or your company would decide to award pictures or to distribute them or to conduct your business enterprises with each theater that you were negotiating?

A. Absolutely not.

Q. Did you always negotiate with the Viking without any understanding of any kind or interference from any other distributor or exhibitor?

(6941)

A. We always did. We negotiated with the Viking as well as everyone else.

Q. Did at any time any distributor or exhibitor defendant exhibitor or anyone else, to your knowledge, attempt to influence you or interfere with your exercise of judgment with respect to any issue with respect to the Viking, either

adjustments, availability, change of availability, whether to award the picture to them or any other subject matter? Did you do this solely by yourself and your company and your producer's representative?

A. Our—everything was done in our best business judgment. We weren't influenced by anyone.

Mr. Nizer: That is all.

Mr. Wolf: I want to ask just two questions.

By Mr. Wolf:

Q. When you came here in 1954, was the split between Warner, between Stanley and the Goldman already in existence?

A. I have been told that it was already in existence.

Q. Whenever Stanley wanted any of the pictures of your company, did you go for those ictures by bidding or by negotiation?

A. Well, if they were interested in the picture and evidenced by sending in a bid, they bid, and they did bid, and on other instances they negotiated for pictures.

(6942)

Q. The pictures that it got, that Stanley got from you, were gotten on written bids; is that correct?

A. That is true.

• • •

Q. Those that we got, I am asking you whether we got those on written bids.

A. Yes. We were awarded two pictures, I believe.

Q. Well, there were only two, weren't there?

A. Yes.

• • •

RE-DIRECT EXAMINATION

• • •

By Mr. Sawyer:

(6943)

Q. I show you P-76, which we are familiar with now as the office Rushgram in which you recommend that—to the home office that the bids on—I have forgotten the name of the picture—the bids on SUMMERTIME, is it?

A. Yes.

• • •

Q. Yes, SUMMERTIME being rejected. What is the date of that, sir?

A. July 14.

Q. And you were—before you took action were you awaiting the response of your home office in New York to your recommendation?

A. Would you repeat that, Mr. Sawyer?

Q. Well, you sent the recommendation the 14th to New York. Now, did you then await the reply of New York to your recommendation to see whether New York accepted your recommendation or rejected it before taking further action with respect to the picture?

A. No. I didn't, Mr. Sawyer.

(6944)

Q. And, in fact, you went ahead and invited—and advised the Viking that their bid was rejected and that it would be negotiated before you had any reply from your recommendation, did you not?

A. No. That isn't so, Mr. Sawyer.

Q. Well, let me point—

A. I advised them before I had a written reply from the home office, but I had a telephone conversation with the home office in which this was thoroughly discussed.

Q. And so then you did wait, did you, for the home office to advise you whether or not your recommendation was rejected, accepted or rejected?

A. I did not wait--

Q. You didn't wait?

A. —for the written reply.

Q. Well, did you—I didn't say "written," Mr. Tunick —did you wait to find out from the home office in New York—

Mr. Nizer: He testified to that.

By Mr. Sawyer:

Q. —before you took any action, whether it was written or otherwise?

Mr. Nizer: I think he—

The Witness: As soon as New York confirmed that the picture should be rejected and negotiated, I

(6945)

immediately sent out letters to all the interested parties advising them that their offers had been rejected and that we would negotiate—

Q. Well, in fact—

A. —with each of them.

Q. Well, in fact, didn't you send out letters to the Viking that the bid had been rejected before the Rushgram even got to New York?

A. It is possible that New York may not have received this Rushgram, but I discussed this over the telephone with New York.

Q. On what day?

A. On July 14.

Q. Well, what was the purpose of the Rushgram?

A. It is a matter of a form.

Q. Is it a matter of just making a record?

Mr. Nizer: Well, I object. The Rushgram itself speaks for itself. He encloses—he says he is forwarding the bids, in addition to discussing them. Apparently that is the practice.

Mr. Sawyer: Well, I am asking the witness why, what was the purpose.

The Witness: The main purpose of the form is to say I am attaching the bids.

(6946)

By Mr. Sawyer:

Q. And what is the purpose of the written reply if you had already been advised and taken action on it?

A. It is for the record.

Q. For the record. Very well. Now, I understand you to say that one of the terms that you were anxious to get on this picture from the—from any theater to whom you were to license it was $15,000 in the seventh week. I am not sure I actually understood your testimony in that respect. Do you recall Mr. Nizer asking you about terms that you sought to get which you didn't achieve? Now, was one of those terms that you sought to get a showing or that —or offer that would indicate to you that you could get $15,000 in the seventh week? Did I misunderstand you on that?

A. Yes. I am sure you did.

Q. Was there a holdover figure of $15,000 that you mentioned?

A. I had attempted to get a holdover figure.

Q. All right; now, wasn't there written on the memorandum which gave you, I think you said, it gave you the standards that you were to go after; is that right?

Mr. Nizer: He didn't say that.

The Witness: No. I didn't say that.

Mr. Sawyer: What?

Mr. Nizer: He didn't say that.

(6947)

The Witness: I didn't say that.

By Mr. Sawyer:

Q. Well, what was the holdover figure that you were going to try to achieve for the seventh week?

A. I was trying to include in my negotiations with the Randolph Theatre that in the event the picture grossed $15,000 for the seventh week, that it would play the ninth week.

Q. Well, that is all I wanted.

A. Well—

Q. That is what I understood.

A. Yes.

Q. That you wanted to get, if you could, provision that said that if the picture played, grossed $15,000 in the seventh week, you would play for a ninth week; is that correct?

(No response.)

Q. Now, that indicates, does it not, that you thought SUMMERTIME was going to be a very big motion picture?

A. Oh, yes.

Q. Because the Randolph to your knowledge never made $17,000, $15,000 in the seventh week, did it? Do you know any picture where they achieved that?

A. You say they never made it.

Q. No—it grossed it. Do you know of any picture where they grossed it, that much on the seventh week?

(6948)

A. I don't recall offhand, Mr. Sawyer.

Q. Well, if they did, it would be only on the very biggest motion pictures that we are taking about here, would it not?

A. We thought this was a big motion picture.

Q. And so that—and you have said, have you not, that you had an expectation generally that SUMMERTIME would be as big a motion picture as you then also thought STRANGER would be?

Mr. Nizer: I object to that as repetitious and not recross.

Mr. Sawyer. It is leading.

The Court: Overruled.

Mr. Sawyer: It is leading. It isn't—

By Mr. Sawyer:

Q. Isn't that correct?

A. Yes, sir. We had hoped it would gross—I believe I said it was around $4 million.

Q. And that was at that time what you expected STRANGER would gross?

A. That was our expectation; yes, sir.

Q. And the—yet you say that on SUMMERTIME the deal submitted, because it contained a house-nut figure which came out first, was for SUMMERTIME to you not an attractive proposition from the Viking?

A. Oh, I just gave that—enumerated as one of the things

(6949)

wrong with the Viking bid.

Q. I know that—

A. There were many things wrong.

Q. But that was—

A. Primarily the fact he couldn't play the picture on August 3.

* * *

Q. And did you not testify that that was a less favorable bid in your opinion for SUMMERTIME than the Randolph terms?

A. Yes, Mr. Sawyer. I testified that was one of the reasons that made it a less favorable bid.

(6950)

Q. And yet that was exactly the type of bid, exactly the bid, in fact, that the Viking was—used in NOT AS A STRANGER, was it not?

A. Nothing could be further from the truth, Mr. Sawyer.

Q. Now, wasn't the NOT AS A STRANGER a 90/10 over a house nut?

A. Oh, yes.

Q. All right.

A. But there—

Q. Now, that is what I want.

A. But, Mr. Sawyer, NOT AS A STRANGER had a ten-week commitment period. It had a $65,000 guarantee.

Q. Well, is a $65,000 guarantee, you consider that the guarantee is a significant factor?

A. It is a very important factor.

Q. All right; now, with respect to terms, Mr. Tunick —and that is what Mr. Nizer asked you about, along with other things—did you not say that with respect to the terms alone that the fact that the Viking on SUMMER-TIME bid 90/10 over a house nut you thought was a bid less advantageous to the distributor than the form of Randolph bid with respect to terms? You did so testify, did you not?

Mr. Nizer: No—the form. I don't think that states the testimony, Your Honor, and I object to it for that reason.

(6951)

By Mr. Sawyer:

Q. Didn't you testify—

The Court: Overruled.

By Mr. Sawyer:

Q. Didn't you so testify, Mr. Tunick?

A. Would you please repeat it, Mr. Sawyer?

Q. Yes. Didn't you testify that with respect to the terms offered by the respective theaters in SUMMERTIME that a 90/10 deal over a house nut was in your judgment a less favorable term than that offered by the Randolph?

A. In evaluating this bid.

Q. All right; and—

A. In evaluating this bid—

Q. Yes.

A. —which was certainly an evidence they couldn't play the picture on availability.

Q. No, Mr. Tunick—

The Court: Let him answer.

By Mr. Sawyer:

Q. Not on availability.

A. I am giving you the complete facts, Mr. Sawyer.

• • •

(6954)

Q. Is it not true, Mr. Tunick, that you testified, when Mr. Nizer questioned you, about two or three different features of these two bids?

A. I testified, yes.

Q. First of all, Mr. Nizer took up availability, did he not, and you compared that?

A. If that is what it was, yes.

Q. And you do recall just a moment ago and then you mentioned that there was a guarantee by the Viking and none by the Randolph and you mentioned that one, and you compared advertising. Do you recall that? And then you also, in answer to one of those questions, made a comparison as to terms, didn't you, by itself, without respect in that question to other things?

Mr. Nizer: The terms include all that, Your Honor.

By Mr. Sawyer:

Q. Do you know the terms in this case? I mean the actual percentage terms.

A. I think I know what you are driving at, Mr. Sawyer.

Q. Yes. Now, the terms actually offered here—terms, now, the fact that it is a 90-10 over a house nut for this were

(6955)

identical to those offered by the Viking, and you accepted it on NOT AS A STRANGER. Can we agree on that? They are the same, are they not?

A. Mr. Sawyer, a guarantee is part of the terms.

Q. Well, in respect, Mr. Tunick, to those terms other than guarantee, advertising or availability, when I am speaking about terms now, isn't it true on a bid, Mr. Tunick, that you have different categories, and one says advertising and one says availability and one says playing time and one says terms; isn't that on your bid?

A. Yes.

Q. All right. And where it says terms, you don't put down availability, do you, or advertising?

A. That's correct.

Q. And where it says terms, you put down the percentage that you are offering or so much of the house nut; isn't that true, sir?

A. You also put down guarantee, if there is one, to be given.

Q. Right in that same section?

A. That is part of the terms.

Q. Right. Now, you don't put in availability, though, under that bracket headed terms then, do you? Can we use the word "terms" the same as you use them in the bid then

(6956)

in your form?

A. What was that?

Q. Can we use the word "terms" then to include that information which is included in your own form when you say terms?

A. Yes.

Q. All right. Now, of the two elements of the terms, you say guarantee is put in under that clause?

A. Yes.

Q. And the other thing that is put in, is it the percentage that is offered to you by the exhibitor?

A. That's correct.

Q. Now, was the percentage offered to you by the exhibitor, Viking, the same on SUMMERTIME as it was on NOT AS A STRANGER?

A. The percentage terms with respect to the fact that both deals were 90-10 over house expense of $4970 was the same, but there was also, which is extremely important, the fact that one was a 21-day or three-week offer and NOT AS A STRANGER was a ten-week offer.

Q. But that doesn't come under the heading "terms," does it, on your own bid, Mr. Tunick? Does it?

A. Mr. Sawyer, you have to evaluate a bid.

Q. I am not speaking of the whole evaluation.

The Court: Mr. Sawyer, he has answered your question. They were the same.

(6957)

By Mr. Sawyer:

Q. They were the same, weren't they?

The Court: He said they were.

Mr. Sawyer: Then he goes on to volunteer something in addition.

The Court: He says why the bid was rejected but the terms were the same.

By Mr. Sawyer:

Q. They were the same, were they not?

The Court: The percentage.

By Mr. Sawyer:

Q. —was the same, wasn't it?

A. Except that the guarantees were different.

Q. All right, we have had that. But except for that, it was exactly the same. Both of them were 90-10 over $4970, weren't they?

A. Mr. Sawyer, I don't see how you can just eliminate and throw out the window a part of the deal.

Q. Were they the same? Were they both 90-10 over $4970?

A. With other provisions.

Q. Of course, with other provisions. Did they both have that provision in it?

A. Yes.

Q. Didn't you tell Mr. Nizer that you thought that since

(6958)

that meant that the Viking would take the first $4970, whereas under the Randolph you would get 50 per cent of whatever came in, that that was one of the factors that made the Viking bid inferior? Didn't you so testify?

A. It was one of several factors.

Q. And this was a motion picture on which you expected the same national gross, the same performance as you had on NOT AS A STRANGER?

A. We had great expectations for it.

Q. And the same expectations as you had for NOT AS A STRANGER, you testified, had you not?

A. Yes, sir.

Q. And on NOT AS A STRANGER did it work out that United Artists earned the highest film rental that it

thus far achieved on that same kind of a deal? Did it so work out?

Mr. Ward: That is objected to, if Your Honor please. Now we have the car in reverse and we are going to hindsight, you see. He is asked to project himself forward now after—

The Court: Well, I think we have covered it I think I have heard it three times now. Go ahead, Mr. Sawyer.

By Mr. Sawyer:

Q. Did it so work out?

(6959)

A. You will have to give it to me again, Mr. Sawyer.

Q. Did it so work out, Mr. Tunick, that on this same exact terms bids that you thought was unfavorable because the Viking would take $4970 of the first money, that on that same exact kind of bid on NOT AS A STRANGER, that you believed to be the picture of the same value as SUMMERTIME, that United Artists earned the highest film rental that it thus far enjoyed first-run Philadelphia up to that time? Did that so work out?

A. It is all hindsight, Mr. Sawyer. Of course, NOT AS A STRANGER happened to exceed our expectations.

Q. You have said that.

A. Whereas SUMMERTIME was the reverse, it went backwards. You said a million and a half or something like that.

Q. Could you answer my question, Mr. Tunick?

Mr. Nizer: That is responsive.

By Mr. Sawyer:

Q. Did it so work out, that you earned the highest film rental on that same kind of a deal?

A. We earned a very high film rental on that deal, on a picture which played, on its given availability which played throughout the summer, which conformed with what we thought was necessary, and they got the picture.

Q. Well, it was the highest, was it not, Mr. Tunick?

(6960)

Mr. Nizer: The highest what? I object to that, Your Honor.

Mr. Sawyer: Well, he said so before.

By Mr. Sawyer:

Q. With respect to this breach of contract on SUMMERTIME, you said, I believe, that you entertained the thought of suit for a long time and then you finally gave up that idea of suing Goldman Theatres; is that right?

A. That's correct.

Q. And when you gave it up, was it then that you put it through as just as if it were an adjustment, made an adjustment out of it?

A. I don't recall the exact date that we put—you mean the change of contract form?

Q. Yes.

A. Yes.

Q. That section.

A. I don't recall what date that was but after—it could have gone through right away or it could have gone later. It showed that the picture only played four weeks instead of eight.

Q. And that signified at that time that that was when United Artists decided they wouldn't sue, they would simply adjust it and adjust the contract to four weeks.

A. May I see the document, Mr. Sawyer?

(6961)

Q. Could you answer me whether or not that is what action United Artists took?

A. Well, would you repeat it and I will answer it.

Q. Well, when United Artists, after this long period of consideration that they would sue and decided not to sue—I will put it this way. Did United Artists take any action pursuant to that decision?

A. Well, we took action with respect that we tried to collect our money. We had several meetings with Mr. Beattie. We threatened lawsuit to him and we made every effort to collect the money.

Q. And when you finally decided that you wouldn't bring a lawsuit, did United Artists take any action to carry out the decision not to bring a lawsuit?

A. The action speaks for itself. We didn't sue. It is the same as we didn't sue Mr. Wren when he owed us money on NOT AS A STRANGER and DESERT SANDS.

Q. Wasn't the action that you took then to put through a form which altered the contract? You wiped it off then, didn't you? You said, "We will alter the contract to four weeks and we will forget about it." Wasn't that the action you took?

A. Yes, we altered the contract to read from eight weeks to four weeks, which is a bookkeeping procedure.

(6962)

Q. All right. Now, that wasn't a long time, was it? It was only nine days later that you did that?

A. I said it could have been either way.

Q. Well, it was just nine days later that that decision was made according to P-78, wasn't it? Take a look.

A. I asked for the document.

Q. Well, I want to know whether or not it was a long time. You said, did you not, that you went through a long period of entertaining the thought that the suit might be brought.

A. There is no question about it, no question about it.

Q. The decision was reached in nine days not to bring it and they put it through?

A. No.

Mr. Nizer: No, Your Honor.

By Mr. Sawyer:

Q. Isn't that correct?

And you put it through—

The Court: Overruled.

By Mr. Sawyer:

Q. —as a contract adjustment.

The Court: Let him answer. He said no. Now explain it.

The Witness: Mr. Sawyer, this is just a bookkeeping entry. It shows that it didn't play eight weeks,

(6963)

it played four weeks. You don't see any other comments on there. It is a bookkeeping entry.

By Mr. Sawyer:

Q. Doesn't it change the contract?

A. Just what I said.

Q. It changes the contract, doesn't it?

A. Yes, from eight weeks to four.

Q. Well, you couldn't sue after that. You changed the contract.

Mr. Nizer: I object to that as a conclusion.

The Court: I will sustain that. A bookkeeping entry on their books wouldn't affect their right to sue. That would never be any defense of Goldman.

By Mr. Sawyer:

Q. And that form actually reads, "Please alter the contract as outlined," does it not?

A. That is correct.

Q. Now, you spoke of the arrangements that you and Mr. Wren made for playing SUMMERTIME an extra week

or a twelfth week—excuse me, NOT AS A STRANGER, twelfth week, they having completed their contractual obligations to play it ten weeks. Just refreshing. You testified to that, didn't you?

A. That is correct.

(6964)

Q. It is true, isn't it, that you and Mr. Wren had discussions about the playing of that motion picture for a twelfth week, did you not?

A. That we did have discussions?

Q. You had discussions about it, didn't you?

A. Yes, we had discussions.

Q. And did you have discussions as to what kind of terms you would be willing to play the picture on? Excuse the preposition at the end.

A. Yes, we did have discussions.

Q. And were you mindful of the fact that the motion picture in its ninth week, for instance, had grossed only $7900?

A. I probably was but it was his desire to keep the picture in, not ours.

Q. Right. And you wouldn't keep it in on the same deal, would you, the house nut deal?

A. No.

Q. Because the gross was going to fall down almost to the house nut, wasn't it, in your judgment?

A. Very probably.

Q. And it did, didn't it? $5203 in the twelfth week, right?

A. Right.

Q. And Mr. Wren told you at that time that he wanted it for a twelfth week because he had nothing else to play in

(6965)

his house?

Mr. Nizer: I object to that, Your Honor.

The Court: Overruled.

By Mr. Nizer:

Q. Did he tell you that? He gave that as a reason, did he not, for wanting to keep it, play the picture a twelfth week?

A. I don't know if at that time he had already licensed DESERT SANDS or not.

Q. But didn't he tell you at that time that he had no picture for that particular time at the Viking?

A. Mr. Sawyer, if he said that and he had DESERT SANDS it wouldn't be so. I don't know when he had DESERT SANDS. I know that it immediately followed NOT AS A STRANGER and we awarded him the picture on a bid and we moved it up.

Q. And you realized, did you not, that both those last two weeks were going to gross, if anything, only perhaps $100 or so above the Viking house nut?

A. It was possible.

Q. And DESERT SANDS, which you gave to the Viking, you mentioned that Stanley bid on it, Stanley bid it for a second feature, didn't they?

A. I believe they bid it as a—I believe they bid percentage terms for the picture.

(6966)

Q. Well, they bid it to play though as a second feature, didn't they?

A. I don't believe so, no.

Q. You don't. All right. We will take a look.

A. It could have been as an equal billed with another picture.

Q. Well, it was to play double feature. I am sorry.

A. The Stanton had that policy.

Q. And they bid film rental of 20 per cent as a co-feature. Would you like to look at it?

Mr. Nizer: The bid was rejected. I don't understand the purpose of analyzing. I don't mind, but what

purpose has it? The bid of Stanley was rejected and Viking got it.

The Court: Overruled. Go ahead.

By Mr. Sawyer:

Q. Do you accept that or do you want to take a look at it?

A. I accept it.

Q. They bid 20 per cent flat to be co-featured?

A. I accept it.

Q. And these motion pictures that we went through here, REBEL IN TOWN and DESERT SANDS and KISS BEFORE DYING and BIG KNIFE and RUN FOR THE SUN, all are pictures that the Viking got from United Artists, that Mr. Nizer mentioned to you—

(6967)

A. Yes.

Q. —that were slough product, wasn't it?

A. Absolutely not.

Q. Wasn't it?

A. No, I don't believe so.

Q. Well, now, the national film rental on REBEL IN TOWN was $435,000 across the whole country. Wouldn't you say that was slough product?

A. Yes. What was it on RUN FOR THE SUN that you mentioned?

* * *

(6968)

Q. And of these pictures that you read, that Mr. Nizer put to you, that the Viking got, every single one of them except for NOT AS A STRANGER had less of a national film rental than SUMMERTIME; is that correct?

A. No, that is not correct.

Mr. Nizer: No. ATTACK, a million four.

By Mr. Sawyer:

(6969)

Q. And SUMMERTIME was a million and a half, was it not?

Mr. Nizer: No.

Mr. Rome: A million and four.

By Mr. Sawyer:

Q. We have one the same and all the rest were less; right? VENDETTA was less, COMANCHE is less and RUN FOR THE SUN—

Mr. Nizer: Your Honor—

By Mr. Sawyer:

Q. BIG KNIFE, KISS BEFORE DYING, DESERT SANDS and REBEL IN TOWN, that is all the rest, and they are all less; is that correct? Do you agree with that?

A. I agree that they were less than SUMMERTIME.

* * *

(6981)

Mr. Young: And we want that at the bottom. Then we object to this on the same grounds as all the rest of these, no picture involved, Mr. Sawyer, among the 87 where they did not have a license.

All of these are competitive bid pictures, you know.

Page 53, Your Honor.

Mr. Sawyer: I think, Your Honor, that if I could argue this just for a moment—

The Court: What are we arguing about?

Mr. Young: "Q. Have you ever exhibited a picture of Twentieth Century-Fox in the period we are

talking about before you had a license agreement for it?

"A. I would say yes."

Now, my objection is that there again we are down to the pictures that are involved and are the pictures in which Viking—none of these pictures was involved, none of the 87, the pictures that Mr. Wren testified to that his bid or offer would have given Twentieth Century-Fox more film, and it was not one of these that was involved. There is no question they had a contract before it was played.

Mr. Sawyer: Your Honor, on this particular thing what I want to read is the following:

(6982)

"Q. Have you ever exhibited a picture of Twentieth Century-Fox—"

This is on page 53—beginning—

"—in the period we are talking about before you had a license agreement for it?" and the witness replied that he had.

I think that shows a general treatment of the Fox whereas on the Fox Theatre pictures, the Twentieth Century-Fox pictures that we showed we in every case had a signed and written agreement prior to the opening date.

Mr. Young: All of the pictures which Mr. Wren had an interest we had a contract before—

Mr. Sawyer: That is true, I assume that is true, I have not checked each one, but I don't doubt your statement.

Mr. Young: There is no question about it.

Mr. Sawyer: It is a privilege accorded to them and not accorded to us.

Mr. Young: He has done some pictures in earlier years where they had been negotiated pictures and they had agreed on the terms and the contract was written up while the picture was playing presumably. It had nothing to do with this case.

(6983)

The Court: I think that I have limited even that testimony to the 87 pictures, haven't I?

Mr. Sawyer: I think you have, Your Honor. I think again, of course, as you know, I don't agree with it, I think it is erroneous. I think this would show a difference in treatment.

The Court: I appreciate your frankness, Mr. Sawyer.

Mr. Sawyer: I will make an offer of proof, if I may.

The Court: Yes.

Mr. Sawyer: I offer to prove that there were instances in which Twentieth Century-Fox permitted the Fox Theatre to open a motion picture before it had any written agreement or contract for that picture whatsoever, and that that never was done for the Viking.

The Court: Objection sustained.

• • •

(6992)

Mr. Sawyer: This, members of the jury, is by agreement reading from portions of the deposition of William J. Moclair, portions selected by both sides:

WILLIAM J. MOCLAIR, having been first duly sworn, was examined and testified as follows:

Q. What is your office address?
A. Fox Theatre Building, 16th and Market.
Q. How long has that been your office?
A. Since 1955, November.
Q. Who employed you for work at the Fox Theatre? Well, the person.
A. Mr. Rick Ricketson.
Q. What was he?
A. Frank Ricketson, excuse me, Frank Ricketson, Jr.
Q. What was his position at the time?
A. General Manager, theatre operations, National Theatres.
Q. Where did the meeting take place at which he employed you?
A. Roxy Theatre, New York City.

(6993)

Q. Who operated the Roxy?
A. National Theatres.
Q. What was your position at the Roxy?
A. Managing Director.
Q. How long had you had that position?
A. March, 1954.
Q. Before that what was your job?
A. Theatre Manager.
Q. Where?
A. At the Roxy Theatre.
Q. For how long?
A. 1948.
Q. Before that were you in the motion picture business?
A. Yes.
Q. Where?
A. At the Roxy Theatre.

Q. What was your position when you came to the Fox Theatre in Philadelphia?

A. Executive Director.

Q. Is that what it is today?

A. Correct.

Q. Where are the financial records of the Fox Theatre kept?

(6994)

A. Los Angeles.

Q. Who told you what pictures to go after for the Fox Theatre?

A. Mr. Frank H. Ricketson.

Q. What did he tell you about that?

A. There was a bidding situation; I would have to bid on the pictures.

Q. On what pictures?

A. Primarily Twentieth Century-Fox pictures.

Q. Did he tell you to stick primarily to Twentieth Century-Fox product?

A. He did.

Q. Did he tell you not to go after any other picture without some sort of authorization from the West Coast?

A. That is correct.

Q. Did he tell you what pictures of Twentieth Century-Fox you would be going after?

A. No.

Q. Who decided what pictures of Twentieth Century-Fox to go after?

A. I did.

Q. Without any advice from the West Coast?

A. Without any advice from the West Coast.

(6995)

Mr. Young: Did you get that question now on page 10?

Mr. Sawyer: Yes. I am just saying that.

Q. Do you remember any occasion when you asked for permission to go after some other product besides Twentieth Century-Fox?

A. I did not ask for permission.

Q. Were you ever instructed in the period that has been referred to to go after any other product?

A. No, I was not.

Q. Did Ricketson explain to you why you were going to go after primarily Twentieth Century-Fox product?

A. No, he did not.

Q. Can you tell me in substance as best you can recollect what he said about that policy?

A. It had been the history of the theatre to have run in most cases just Twentieth Century-Fox film, and they were the only company who we were going after.

Q. Did he tell you what the other downtown theatres were going after?

A. No. I knew they were going after all of the other product.

Q. Did he tell you anything about a split between

(6996)

Stanley Warner and Goldman Theatres?

A. No, he did not.

Q. Did that ever come to your attention?

A. It did.

Q. In what way?

A. I would say in general conversation with any of the men that you are liable to run into on Vine Street.

Mr. Young: Where do you go to now, page 15? 14, isn't it?

Mr. Sawyer: You cut this out; right?

Mr. Young: That is right.

Mr. Sawyer: All right.

Q. Did you ever have any discussion with George Beattie, in which he asked you whether there were any Twentieth Century-Fox films that the Fox Theatre was not interested in?

A. Yes.

Q. Can you tell me what th nature of that discussion was, in substance?

A. If there were an abundance of product, and in most cases they were just minor pictures that I had no interest in going after, I would tell him that.

(6996a)

Q. Did you tell anyone at Stanley Warner that, too?

A. I did.

(6997)

Q. You don't remember the picture involved or the pictures involved with Beattie, do you?

A. No, I don't.

Q. Do you remember whether they were Fox pictures which some Goldman Theatre thereafter played?

A. I don't recall that either.

Q. Did you ever have any similar discussion with any other first-run exhibitor?

A. Other than Stanley Warner and Goldman, are you asking?

Q. That's right.

A. No.

Q. Have you ever been in the Viking Theatre?

Mr. Young: What page is that on now, Mr. Sawyer?

Mr. Sawyer: 48.

Mr. Young: Sir, I believe I had one that I pointed out to Mr. Steinberg a little bit before that.

Mr. Sawyer: Well, I thought we had just crossed them off, Mr. Young.

Mr. Young: Well, I am not sure, you see.

Mr. Sawyer: All right. I will wait. I have it crossed out here.

(Counsel confer.)

(6998)

Mr. Young: All right. Very well. On 46—on page 45, Mr. Sawyer, right here.

Mr. Sawyer: Well, I don't even have that marked.

Mr. Young: Well, I thought I gave it to Mr.—will you take a look at it, a quick look at it right now, and answer to that question.

Mr. Sawyer: All right.

Q. Have you ever been resent when all of the bids are opened?

A. Always present.

Q. Do you know when that started?

A. No, sir, I do not.

Q. Has it been in existence ever since you have been at the Fox Theatre?

A. It has.

Q. Had you started to work there when "The Tall Men" was playing?

A. I arrived there, I believe, the day before the picture opened.

Q. Have you ever in attending the opening of bids been of the opinion that some other theatre's bid was better than that of the Fox Theatre when the Fox Theatre was awarded the picture?

(6999)

A. I have not, no.

Q. Have you ever been in the Viking Theatre?

A. I have, sir.

Q. What is your opinion of it as a theatre, a first-run theatre?

A. A very fine theatre.

Q. You said a little while ago that the Viking was an excellent theatre, didn't you?

A. I did.

Q. In the same sense, how does the Midtown compare with the Viking? Go ahead. You can answer.

A. It is a fine theatre.

Q. What did you mean when you said the Viking was a fine theatre?

A. Its appearance.

Q. How about its reputation?

A. I don't know anything about its reputation, I am sorry.

Q. Have you ever observed the way in which it is operated?

A. I have.

(7000)

Q. What is your opinion of that?

A. Operated well.

Q. What is your opinion of its location?

A. At a disadvantage, compared to some other theatres.

Q. What first-run theatres in your opinion have a better location in Philadelphia than the Viking?

A. I believe all of them.

Q. Did that include the Mastbaum?

A. No, it did not.

Q. Does it include the Boyd?

A. I would say the Viking in the location was superior to the Boyd.

Q. How about the World?

A. The World had the advantage of Market Street.

Q. Is Market Street an advantage, in your opinion, over Chestnut Street?

A. It has.

Q. How did the Viking compare with the Randolph?

A. The Randolph was a better location because of its close proximity to shopping.

Q. Why was the Mastbaum then in your opinion worse than the Viking, in the sense that it was on Market Street?

A. Just a block too far north. I think that has proven

(7001)

itself by the razing of the theatre—I mean it is too far west.

Q. West?

A. West, excuse me.

• • •

(7022)

• • •

THIRTY-NINTH DAY

(7035)

Mr. Sawyer: With Your Honor's permission, again by agreement of counsel, in lieu of the witness being called, portions of his deposition will be read.

The deposition of JOHN BRYNE of Loew's, Incorporated, also known as Metro.

Page 3, Mr. Reporter.

(7036)

Q. Mr. Bryne, what is your present position with Loew's?

A. General Sales Manager.

Q. Are you an officer of the company?

A. Vice-President.

Q. When did you become General Sales Manager?

A. 1957, about January.

Q. Before that were you the Eastern Division Manager?

A. That's true.

Q. How long had you been the Eastern Division manager?

A. About eight or nine years.

Q. What did the Eastern Division cover?

A. New York, Boston, Buffalo, New Haven, Philadelphia, Albany.

Q. As Eastern Division manager did you supervise the Philadelphia branch?

A. That was under my supervision.

Q. Unless I specify otherwise, my questions will all relate to the period 1954 to 1956. In that period did you keep close contact with the Philadelphia operation?

A. No.

I will read the next one.

Mr. Adams: All right.

(7037)

Q. Did you visit the Philadelphia branch from time to time?

A. Yes.

Q. Suppose the Viking, then, showed an interest in a picture, am I correct it would be required to make a firm written commitment in its offer for the picture?

A. Well, whether it was firm written or firm oral, I wouldn't know at this time, because I knew that oral bids were being accepted from others, and it may have been that they would have been accepted from them.

Q. Do you actually know of any oral bid that was accepted?

A. No.

Q. Did anyone ever tell the Viking that they could make an oral bid?

A. I don't know.

Q. Don't you know as a fact that where bidding was in effect, the Viking was held to a firm written commitment in every case?

A. I believe that is so.

As with every other exhibitor, whenever a firm written commitment was received from them.

(7038)

Q. Suppose Goldman or Stanley Warner made an oral offer but it was not a firm commitment. Would that be considered a bid?

A. I don't think so.

Q. Would you say that the Viking was given an opportunity to obtain all of your first-run product in Philadelphia?

A. I think it was.

Q. On the same basis as Goldman and Warner?

A. With the exceptions you just asked about.

Q. Well, when you said that there were certain exceptions qualifying your answer, what did you have in mind?

A. That if an oral bid was made by someone other than the Viking, the Trans-Lux, the World, or the Warner theatres, that it too would be given the same kind of consideration as though it had been a firm written offer.

Q. Was that actually a matter of company policy?

A. In that particular situation only.

Q. Is there any reason for that?

A. Only because of the prior agreement by Mr. Rogers with Mr. Goldman.

Q. Did the prior agreement include the right to make oral offers which would be considered the same as firm written commitments?

(7039)

A. The agreement was not that all-embracing at the time.

Q. Later did it develop that that was part of the agreement?

A. There was no further agreement. We proceeded on the basis as outlined, under which we had been operating.

Q. Suppose your branch manager in Philadelphia would make inquiries and find out that no one except Goldman or Stanley Warner was interested in a picture. It is true, is it not, that the picture would then just be licensed either to Goldman or Stanley Warner, depending on which side of the split it was on?

A. Yes.

Q. Well, the Viking had to bid to get its product if Goldman or Stanley Warner expressed any interest in the picture; isn't that right?

A. Yes.

Q. And that is true even if Goldman's interest included a statement that he wouldn't make any firm commitment on the picture?

A. Then the firm bid would take precedence over a statement of that kind, in my opinion.

Q. But it would be considered a bid, and the Viking would have to put in a firm bid to get the picture; that is right,

(7040)

isn't it?

A. Yes.

Mr. Sawyer: Page 14:

Q. Are you familiar with a statement that Mr. Reagan made with respect to the policy of the company on May 21, 1956?

And that happened on a number of occasions, did it not?

A. I don't know that it did.

That referred to what has just been read.

Q. Did you personally have anything to do with negotiating adjustments in first-run Philadelphia?

A. No.

Q. Did you approve the adjustments?

A. They didn't come to me for approval. If any of them did, I would have approved them. I would have been the one to approve them based on the branch's recommendation.

Q. You would just follow the recommendation of the branch manager?

A. Yes.

(7041)

I may state that Mr. Reagan referred to here was at the time here referred to an official of Loew's.

This is 14 again:

Q. Are you familiar with a statement that Mr. Reagan made with respect to the policy of the company on May 21, 1956?

A. I read what Mr. Reagan stated at the time he did. I have had no particular reason to refer to it since. If there is something specific you want me to try to recall, I will.

This is the same question:

Q. Mr. Reagan stated:

"It is well known to exhibitors throughout the country and particularly to the small independents that Loew's has for many years maintained an 'open door' policy. Over the years our door has remained open to any exhibitor who wishes to present any grievances or complaint. He has at all times received our whole-hearted cooperation. Illustrative of this is our policy with respect to adjustments of film rental. After a reasonable film rental has been agreed upon and after the picture has been exhibited, we have reduced film rentals when the performance of a picture

(7042)

has for unforeseen reasons not come up to expectations. Our branch managers throughout the country have authority to grant film rental adjustments."

Is that a correct statement of the company's policy in the period we are discussing?

A. Yes, with one exception. The questions you asked me relative to adjustments in the beginning of this questioning about bidding situations. That is still the company policy.

Q. And that is the company policy even where one of the bidders has to make a firm written commitment and the others have an understanding that they can make oral offers or offers that are not firm; is that correct?

A. Mr. Adams, there is a little qualification here that is escaping me a little. Mr. Reagan's reference to the company policy would have reference to all pictures in the United States negotiated on an ordinary basis. Now, aside and distinct from that, in bidding situations, we had, for reasons we believed to be right, refrained from granting adjustments. Now, if a firm oral offer was made anywhere and the man happened to be awarded the picture, the matter of adjustment would be just as firm against consideration for such as it would be if it had been a firm written bid.

Q. Isn't there a distinct difference in that with a firm written bid you have physical evidence of the firm commit-

(7043)

ment, but with an oral offer you have no such evidence?

No answer.

This is 17:

Q. Now, Mr. Reagan also stated in the same statement:

"It is obvious that the agreement of each competitor is necessary in order to work out such a split arrangement."

Then the questioner says:

Let me go back to the beginning of the paragraph.

Then he quotes Mr. Reagan again:

"In an effort to cooperate with all exhibitors we have indicated a willingness to eliminate competitive bidding whenever possible in situations where returns from the theatres are comparable by licensing our pictures on a split basis, that is, dividing our product between or among competitors. It is obvious that the agreement of each competitor is necessary in order to

(7044)

work out such a split arrangement."

Is that an accurate statement of your company's position at that time?

A. Yes.

This is still 18:

Q. It is stated in Loew's answers to the interrogatories filed, on the subject matter of this split, and I only have a typed copy. I will read it.

"This defendant," that is Loew's, "has given plaintiff an equal opportunity with all other exhibitors to license each motion picture distributed by Loew's Incorporated."

Then continuing:

"This defendant has also been willing at all times to discuss with plaintiff"—that is Viking—"the extension of the aforesaid or a similar method of distributing motion pictures"—that is the split set up by Rogers—"so as to include plaintiff or any other exhibitor in central city Philadelphia and has indicated a willingness to consider such a suggested

(7045)

method of distribution provided the affected exhibitors in central city Philadelphia would agree among themselves as to the method to be utilized."

Now, is that intended to convey the same suggestion that is contained in Mr. Reagan's statement, in other words, that all exhibitors have to agree if there is to be a split?

A. Yes.

Mr. Adams: A split affecting those exhibitors that would be included in the split.

By the questioner:

Q. You never tried to negotiate any split with the Viking and the other first-run exhibitors, did you?

A. No, I did not.

Q. Do you know if anyone else did in your company?

A. I do not know.

Q. Would it have come to your attention, as Eastern Division manager, if such had been the case?

A. I think so.

Mr. Adams: We are still talking about this 1954-1956 period?

Mr. Fine: That is right, sure.

(7046)

By the questioner:

Q. Are you familiar with any policy of your company —we are still in that period—with relation to payment of advertising expenditures on 90-10 deals?

A. Yes.

Q. What is that policy?

A. On pictures that are negotiated on a 90-10 basis usually the company pays all the advertising.

Q. Suppose the deal is a bid but the bid is silent as to how the advertising is to be handled and the license agree-

ment is similarly silent, does your company have any policy then as to who is to pay the advertising?

A. It should be a question of negotiation between the sales department and the exhibitor or the advertising department and the exhibitor.

Q. Well, if it is a question of negotiation, wouldn't it follow the same policy that you have with negotiated 90-10 deals?

A. Usually.

Q. That is, the usual practice would be, where the advertising is negotiated, that your company would pay all of the advertising on a 90-10 deal?

A. Yes, but it is always a matter of negotiation.

(7047)

Q. Did your company have any policy of rejecting bids with advertising clauses unless the advertising clause conformed to some specific requirements of your company's policy?

A. I don't know about any rigid policy, but it would be something that if a clause was contained in a bid and it was in opposition to the manner in which the advertising department wanted to participate, that would be discussed by the bidding department with the advertising department, and if there were contained in the bid something that was objectionable, it would have something to do with judging the award.

Mr. Sawyer: Page 51.

Q. Well, you certainly wouldn't, though, discriminate against one theatre in favor of another?

A. If I make a better deal in one situation than I do in another, I don't call that discrimination any more, Mr. Fine, if I may add, if the exhibitor makes a better deal with me than he makes with other companies.

Q. Did you know of Goldman's policy against giving cash guarantees?

(7048)

A. I never knew that he had any such policy.

Q. Are you aware of any cash guarantee that he has given your company?

A. No.

Mr. Sawyer: Page 70.

Q. On this GUYS AND DOLLS matter, before we leave it, who had the authority to make the final decision as to whether the picture was to be awarded, in so far as the large cities like Philadelhia were concerned?

A. In so far as every city in the United States is concerned, the Goldwyn interest.

Q. Did you or anyone else at Loew's have anything to do with making the decision regarding downtown Philadelphia?

A. On GUYS AND DOLLS?

Q. Yes.

A. No, sir.

Mr. Sawyer: I would like to have this marked, Mr. Stenographer.

(7049)

(Document dated June 6, 1956, bearing the caption "MEET ME IN LAS VEGAS, Stanton Theatre," was marked Plaintiff's Exhibit 192 for identification.)

Mr. Sawyer: P-192 is marked, Your Honor, and it is the document that was mentioned this morning, and I now offer it and ask to read it to the jury.

Mr. Wolf: I object, Your Honor, and also call attention to the fact that Mr. Sawyer has stated that this is not offered as against the Stanley Company of America or Stanley Warner Management Corporation.

Mr. Sawyer: Correct.

I read the document which has been marked P-192. It is headed Ed Gallner—

Mr. Wolf: What is the date on it?

Mr. Sawyer: I have not come to that yet.

Mr. Wolf: Excuse me.

Mr. Sawyer: I am reading from the top first.

"Ed Gallner." On the right it says "Sidney Goldstein, Meet me in Las Vegas, Stanton Theatre, June 6, 1956.

"Dear Sidney:

"Stanley Warner is asking for a total of $6517.16 for the first week of MEET ME IN LAS VEGAS

(7050)

at the Stanton Theatre. There are a couple of small bills missing, but they are getting them and, anyhow, they are not too important.

"However, that is not the point of this letter. The point is that there are a number of items for which we are being charged and which ordinarily we do not accept. These items include such charges as trailers, mats, type and cuts. I have marked the items for which we do not ordinarily pay in 'blue'. If we were to deduct those items, the total cost would come to $6362.16.

"The same thing holds true for all of the subsequent weeks up to and including the fifth week."

I would elect not to read these figures unless you want me to.

Mr. Ward: Our position would be, Mr. Sawyer, that the entire letter should be read.

Mr. Sawyer: "For the second week, Stanley Warner is asking for $1454.56. In accordance with my figures, the amount should be $1421.79.

"The third week should be $992.53, instead of $1065.87.

"The fourth week should be $873.97, instead of $960.74.

(7051)

"The fifth week should be $1103.10, instead of $1181.41.

"Even if we agreed to pay for these cuts and stats, I certainly see no reason why we should be forced to pay $55.50 for type for the fifth week, $43.20 for type for the fourth week and $51.30 for type for the third week.

"It appears to me that we will have to have a meeting with Birk Binnard, Ad Manager of Stanley Warner, to get this entire matter straightened out, not only for this picture but for all subsequent pictures. Warners is going to insist on placing such items on all campaigns and, we, in turn, will insist that we will not pay for them. We must consider the fact, however, that Stanley Warner can with-hold payment of its film rental in an effort to enforce its demands, just as they are doing now with GUYS AND DOLLS in the smaller situations.

"Please let me know your pleasure in this matter.

"Best personal regards.

"Cordially yours,

"Ed Gallner."

And on the left side is "EG/sg Enc."

Now, if I may proceed with reading from the

(7052)

deposition of Mr. Madden. With the permission of the Court and agreement of counsel, in lieu of calling this witness, portions from his deposition will be read.

Deposition of WILLIAM A. MADDEN.

Q. Are you employed by Loew's Inc.?

A. Yes.

Q. That is sometimes known in the trade as Metro, isn't it?

A. That's right.

Q. Or MGM?

A. That's right.

Q. How long have you worked for Loew's?

A. Since 1930.

Q. Will you briefly tell me what you have done at Loew's since 1930, going from job to job in the company.

A. Well, I worked in the home office, started as an office boy and worked in the various departments, mostly sales, up to the year about 1938. Then I started to travel for the company. 1940, in 1940, approximately 1940 I was student salesman. 1941 I was transferred to the home office where I was assigned to further sales duties. In 1942 I enlisted in the Navy for 3½ years and upon my return in 1946 I was

(7053)

assigned to sales duties out of the Cincinnati office, and then from 1947 to 1954 I was a salesman in Boston.

Q. What part of 1954 did you leave?

A. Up to September of 1954. Then I was transferred here to Philadelphia.

Q. What have you done since September, 1954, and what has your title been in each year since then through 1956?

A. Since September, 1954, I have been branch manager of the Philadelphia office.

Q. In September, 1954, when you came here who was your immediate superior?

A. Mr. Lou Formato was my district manager.

Q. Did you replace him as branch manager?

A. Yes.

Q. And did he continue as your district manager through 1956?

A. Yes.

Mr. Sawyer: Page 19.

Q. During your time, how did it function?

A. They would make a listing of two groups of our pictures, or from our release schedule, I imagine is where they got the

(7054)

pictures, and they would notify us accordingly.

Q. Did that mean they were not competing with each other for the pictures on each other's list?

A. I believe they have competed in some instances.

Q. Well, when they made up these lists of pictures, was there one half for Stanley Warner and one half for Goldman?

A. The two listings?

Q. Yes.

A. Yes.

Q. And did they normally compete for each other's pictures on those listings?

A. Generally?

Q. Yes.

A. No.

Mr. Sawyer: Page 41.

Q. In evaluating first-run bids, did you in this period as a criterion ever use your opinion as to whether the Midtown could outgross the Viking on your product?

A. I don't recall.

Q. Did you have any opinion in the period on that point?

A. No.

(7055)

Q. Did you ever make such evaluation?

A. I don't recall.

Mr. Sawyer: That, Your Honor, concludes the reading. There are two brief offers of proof of material out of Mr.—I am sorry, there is this additional question.

Question by Mr. Adams for the defense.

Q. Did you have any agreement or understanding with any distributor or any exhibitor to deprive the Viking Theatre of an opportunity to compete for and obtain first-run pictures in downtown Philadelphia?

A. No.

Mr. Sawyer: There are two short offers of proof, Your Honor. The documents that have been marked and some of which have not been offered I would offer which, as I say, I think Your Honor had said we would let the jury go on that, that might take some time. But if that is Your Honor's plaesure, then I announce that the plaintiff rests subject to that offer.

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(7071)

Mr. Sawyer: I now move, Your Honor, to admit into evidence the documents which have been marked up to and including P-192, that having been admitted, up to and including P-191, with the exception of the following: The numbers I now read are not offered.

1. These are the same as—you might check it—as I gave you last night. 1—

The Court: These are not offered?

(7072)

Mr. Sawyer: These are not offered.

The Court: Yes.

Mr. Sawyer: 1, 5, 22, 24, 26, 31, 63, 67, 68, 81.

Mr. Young: What was that?

Mr. Sawyer: 81.

Mr. Young: 81.

Mr. Sawyer: 85 to 100, inclusive, not offered; 114, 115, 145A, B and C; 146, 149, 150—well, wait a minute. Strike that Mr. Stenographer, please.

153, 154.

Mr. Ward: Did you take out 149 and 150?

Mr. Sawyer: I started to say something about them and then I asked him to strike it out and I will have a remark to make about it in a moment.

Mr. Ward: Well, the last one you withdrew was 146; right?

Mr. Sawyer: 146 not to be offered, and then 153 and 154, likewise not to be offered; 152 and—strike that. Strike that, please.

Now, P-52 and 53 and P-149 and—

Mr. Ward: Just a second.

Mr. Sawyer: —150—

Mr. Ward: Just a second, please. P-52 and

(7073)

P-53?

Mr. Sawyer: And P-149 and 150, I will make an offer of proof, because I assume that Your Honor would not admit them, consistent with prior rulings.

All other documents are offered, and I do not distinguish with the few that have been already admitted;

I think it would be cumbersome to do so, and I suppose we can just go ahead with the ones that are objected to.

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(7086)

Mr. Ward: We object to P-8, if Your Honor pleases, which has been commonly referred to as the Hugh Owen memorandum. I am aware of the fact that that has been the subject of argument and presentation to Your Honor in the form of briefs. Our objections have been previously stated.

We would ask Your Honor, respectfully, to reconsider that matter, and we would be prepared to present our views more fully, if Your Honor should require it, and

(7087)

request it, on Monday.

The fundamental basis of our objection to Your Honor's previous ruling with respect to the admission of this memorandum by Hugh Owen is that it is not such an exhibit or document as falls within the so-called shop rule or book rule of evidence.

This is a report, if you please, made by Mr. Owen on one isolated instance, a so-called one-shot report from one man in the Paramount Company to another, the anti-thesis, I respectfully submit, of a consistent, systematic course of regularity in carrying on the business of the company; and we should like to renew our objection to the admission of that document because of its prejudicial effect and for leave, if Your Honor, as I have said, if Your Honor would like to have us do so, to reargue that matter on Monday.

The Court: I adhere to my ruling. That matter was briefed, carefully considered, and I have a memorandum opinion which I read into the record.

It will be received.

Mr. Goffman: Your Honor, may I just interject that I am assuming that—I guess we are all assuming that the objection by any one of us applies for the benefit of all defendants.

(7088)

The Court: Surely. Yes, indeed.

Mr. Young: I would also like to ask about that one. Mr. Sawyer, as I understood, is offering that against Paramount only.

Mr. Wolf: That is what I was going to say.

Mr. Sawyer: No. I was offering it as to Paramount, Stanley Warner and Goldman.

Mr. Wolf: Oh, oh, it was not originally offered against anybody except Paramount.

Mr. Ward: That is right. I object to its offer as to any defendant at all—

Mr. Sawyer: Well, it has been connected up.

Mr. Ward: —except Paramount.

Mr. Sawyer: It has been connected up.

Mr. Wolf: Oh, no.

Mr. Sawyer: Well, it is offered more than that. I offer it against Paramount, Warner Brothers, Goldman and Stanley Warner.

Mr. Wolf: Well, this is certainly something new.

Mr. Sawyer: Now, Your Honor can reserve—

Mr. Rome: At the time it was offered in the record it was offered most particularly only as against Paramount.

(7089)

Mr. Wolf: That is right.

Mr. Sawyer: I suggest this, Your Honor: If Your Honor would reserve on that until argument, I think it is a matter that I will develop in argument and it will be touched upon; that is, the degree to which (a) the Schwalberg agreement and the degree to which this document as an exposition thereof is applicable to more than one or two defendants. I think if Your Honor could reserve on that, we would have—have some briefing and some, of course, an argument on it and it would be—come up on Monday.

Mr. Wolf: This is a pure matter of hearsay. This has nothing to do with any testimony that was given. It was ruled out, except as to Paramount, because except as to it it is a pure matter of hearsay.

The Court: No; I will admit it as to Paramount, reserving the right to Mr. Sawyer to brief it—

Mr. Sawyer: Yes, sir.

The Court: —and argue the point.

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(7090)

Mr. Wolf: Your Honor—excuse me—this matter brings up a very complicated subject. Practically all of these exhibits are merely as to one or two or per-

haps three of the defendants and practically none of them as to all the defendants.

I now am not in a position to know as to which of them they are being—as to which of the defendants Mr. Sawyer is offering them, because I had assumed that the previous ruling that has been made—that is, that exhibits were offered only as to those who were parties to the particular exhibits—stood,—

Mr. Sawyer: Well, —

Mr. Wolf: —but if Mr. Sawyer is now trying to open up that old matter, we must ask him—

Mr. Sawyer: I don't think—

Mr. Wolf: Excuse me. Will you excuse me? —we must ask—

Mr. Sawyer: I am trying to save time, because I am not opening up. The thing does stand. I will interrupt you, but I assure you it will save time, Mr. Wolf, because what you are protesting about is something I do not intend to do. They are offered for those to whom they pertain. Now, does that relieve you?

(7091)

Mr. Wolf: Well, I assumed that as to the previous one.

Mr. Ward: That was my assumption.

Mr. Wolf: Is that the only one?

Mr. Sawyer: That was a very special case, Your Honor.

Mr. Wolf: Is that the only one?

Mr. Ward: That was my assumption.

Mr. Sawyer: Well, all — the ones he just mentioned are offered for those people to whom they were addressed or written by and nobody else. They are bids. That is all.

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(7092)

Mr. Ward: I now address myself to P-23, as to which we have no objection, subject to Mr. Sawyer's previous statement that it is offered with respect to the parties by whom or to whom—by whom it was written or to whom it was addressed.

The Court: That is the understanding.

Mr. Sawyer: That is right.

The Court: All right.

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(7130)

FORTIETH DAY

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(7333)

Mr. Nizer: This is the very charge he is making. This is the great hullabaloo he is making about the Hugh Owen memo.

Actually, of course, the record is incontrovertible that this never occurred. From the moment that split was arranged in 1953, everybody testified that the practice of Paramount was if a bid was rejected to negotiate with everyone. And, Your Honor, this isn't just sworn testimony. They had letters, form letters, that went out in every instance, and Mr. Wren conceded that he received those letters back in 1955 all the time, so there couldn't have been any afterthought about this. And Your Honor will even recall the humorous testimony that he got such a letter and just one of those two pictures, that is all that is involved, he got such a letter and he said, "Well, but my grievance is they didn't come over to my office. They used to go to Goldman's office to negotiate."

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(7347)

FORTY-FIRST DAY

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(7460)

The Court: Now, gentlemen, I desire to rule because this is the only other question that is presently before me. The plaintiff claims and seeks to bring Schedule "A" to bear upon an issue other than the extent or amount of damages. More specifically plaintiff contends that Schedule "A" is a demonstration of the fact of damage, because the Viking had to pay a consistently higher amount for its pictures than the other exhibitor defendants. Plaintiff attempts to establish this theory by comparing the average film rental to gross receipts of all the exhibitors including Viking, and deducing therefrom that Viking paid, and I quote "30 per cent more for its basic cost item than the other exhibitor defendants."

To this offer the Court cannot agree for a variety of reasons, and accordingly I will sustain defendants' objections.

The computations embodied in Schedule "A" include all of the pictures shown at all the theaters during the period of the suit. It is not limited to the 87 pictures that plaintiff sought. It also includes pictures of other distributors not parties to this suit. If this were permitted it would open the door to a review of over 400 pictures as to the amounts of the bid, comparisons of bids with other theaters, and the reasons why a bid for a certain picture was

(7461)

made including playing time, theater, and many other considerations. I believe it to be too remote and indefi-

nite. There is no testimony in the case that plaintiff was in any way forced to bid or negotiate with any distributor defendant. Its offer submitted to the defendant distributors was as a result of conferences between officials of plaintiff company when they determined what pictures to seek and the terms to be submitted. All this was done by their independent thinking without knowing what other exhibitors were making offers for the picture, if any, or the terms of such offers.

The position that plaintiff seeks to maintain, in my judgment that is, that relative film rental may be a badge of conspiracy, overlooks certain operational features of the motion picture industry. It is an inescapable conclusion that certain theaters will have a higher gross than others and this will hold true even if both are playing comparable product for the same length of time. This disparity of grosses may readily be attributed to factors of management, location and other elements which tend to reflect a successful theater's enterprise, and not to conspiratorial conduct. As the inferiority of the theater increases, as evidenced by substantial past performance, the higher its film rental will be since the distributors will desire a higher film rental in order order to compensate for the poorer grossing of the theater.

(7642)

Especially is this true in situations where film rental is determined by percentage of gross box office receipts rather than flat fee rental.

Plaintiff's theory does not take into account the comparative ability of the various exhibitors in bidding for pictures over a lengthy period of time. Experience, intuition and a myriad of other factors not connected with conspiratorial conduct will be reflected in the ratio of film rental to gross receipts . . . .

Plaintiff relies upon U. S. v. Lilly (24 F. R. D. 285 (1959)) to substantiate its position that evidence of identical prices charged by a seller or sellers is admissible to prove that identity of price was arrived at by collusion. The situation in Lilly is wholly inapposite to the instant case. Here the pictures were bid by all, and implicit in the bidding situation is a variety of price and terms.

So that I have ruled out the percentage calculation as offered by the plaintiff, but Schedule "A" is still in evidence as far as the amount of damages is concerned.

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(7469)

FORTY-SECOND DAY

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(7471)

The Court: Ladies and Gentlemen of the jury. You are doubtless aware that the reason that you were excused from attendance at this trial on Monday and Tuesday of this week was to enable counsel for defendants to make

(7472)

certain motions at the close of plaintiff's case. The purpose of those motions was to bring an immediate end to the case on the ground that the evidence was insufficient to support a decision in plaintiff's favor.

Several weeks ago, in the course of plaintiff's case, somewhat similar motions were made by the defendants. Those motions, which were elaborately briefed

and argued by the parties, were given most careful consideration by this Court. Even then, I was indeed in serious doubt as to whether the plaintiff could ever prove his case. As a m er of fact, I decided then to direct you to find for lefendant RKO. I ruled in that manner because th e was no further evidence to be presented against that defendant, and the record clearly showed no basis for a verdict against that defendant in my considered judgment.

As to the other defendants, however, I reserved my rulings as to several, and denied the motions as to the others. It is a very serious matter to interrupt a plaintiff in the course of his case, and dismiss the action before he has had his chance to produce all the competent evidence within his power to bring forward. I therefore refrained from taking action then, but did require the plaintiff to forecast the evidence he intended to produce in order to finish up his case.

(7473)

When the plaintiff had rested his case on Friday, the motions to dismiss—now called motions for directed verdict—were renewed by the defendants, and briefed and argued exhaustively. I have spent the better part of the four days and nights last past, believe me, studying the motions and the analyses of the testimony and evidence in the plaintiff's case. In particular, of course, I have been examining the testimony to determine whether or not plaintiff has succeeded in producing the evidence which he had indicated that he would be able to bring forward in order to make out his case.

As a result of that study, I have decided to grant the motions of all of the defendants. In other words, asuming everything the plaintiff has introduced as proof is to be believed, and you have heard all of it, I have determined that there is no basis in the record for

a finding that all of the defendants or some of them are guilty of any unlawful combination or conspiracy against the plaintiff, vertical or horizontal, and as part of the same decision I find that there is likewise no basis for a finding of another important factor or element of the plaintiff's complaint—the fact that plaintiff was damaged or injured as a result of any such combination or conspiracy." Accordingly, I direct you to find a verdict for each defendant and against

(7474)

the plaintiff in this cause.

Had I chosen to do the cautious and conservative thing, I would have denied these motions. Defendants would then have proceeded with their evidence—a matter which might have consumed from two to eight weeks, according to various estimates.

I should then have instructed you on the applicable law, in accordance with the instructions which I have long since prepared, and have been constantly amending in accordance with the progress of the trial.

You would then have been sworn to find the verdict in accordance with the evidence, and been taken to the jury room to commence your deliberations. It seems to me much more than likely, although I may be mistaken, that you would then have arrived at the same conclusion as did the Court.

In any event, however, had your decision been in favor of the plaintiff, this Court would have been compelled on the evidence introduced by the plaintiff to set aside the verdict as a matter of law—being convinced without the slighest doubt that there is no evidence in this record which would justify a plaintiff's verdict. Above say—the evidence could not support such a verdict. I am completely satisfied in my own mind that this is a

(7475)

proper and just result under the law. Of course, I can be wrong.

While I would have welcomed your aid in deciding the case, you have already had a prolonged trial, and to require your presence here for many more weeks, under the circumstances, seemed to me unfair, unnecessary, and a waste in time and money under my view of this case. Again, I trust that I am right. Therefore, this decision has been made, and the case is being disposed of on the Court's own authority.

For all of the foregoing reasons, I direct your Foreman, therefore, to bring in a verdict in favor of all the defendants and against the plaintiff—which will be the end of the case so far as you are concerned.

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(7476)

The Clerk: Members of the jury, have you agreed upon your verdict?

The Jury: We have.

The Clerk: In accordance with the direction of the Court do you find for the plaintiff or the defendants?

The Foreman: The defendant.

The Clerk: "The defendants," in the plural?

The Foreman: Yes.

The Clerk: Members of the jury, hearken to your verdict as the Court hath directed it, in the issue joined wherein the Viking Theatre Corporation is plaintiff and the defendants are as follows: Paramount Film

Distributing Corporation, Columbia Pictures Corporation, Universal Film Exchanges, Incorporated, United Artists Corporation, RKO Teleradio Pictures, Incorporated (formerly RKO Radio Pictures, Incorporated), Warner Brothers Pictures Distributing Corporation, Twentieth Century-Fox Film Corporation, Loew's Incorporated, Stanley Warner Management Corporation, Stanley Company of America, William Goldman Theatres, Incorporated, and Fox Philadelphia Building, Incorporated, you find for the defendants

(7477)

and against the plaintiff, and so say you all?

The Jury: We do.

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JUDGMENT.

Before LORD, *J.*

AND NOW, to wit: JULY 19th, 1961, in accordance with the Verdict of the Jury as Directed by the Court, it is ORDERED that Judgment be and is hereby entered in favor of Defendants, Paramount Film Distributing Corp., Columbia Pictures Corp., Universal Film Exchanges, Inc., United Artists Corp., Warner Bros. Pictures Distributing Corp., Twentieth Century-Fox Film Corp., Loew's Incorporated, Stanley Warner Management Corp., Stanley Company of America, William Goldman Theatres, Inc., Fox Philadelphia Building, Inc., and against the Plaintiff, Viking Theatre Corp., with costs.

By The Court:

ATTEST:

/s/ ROBERT E. CRISWELL,
Deputy Clerk.